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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 61

BEST & COMPANY, INC., APPELLANT,

vs.

**A. J. MAXWELL, COMMISSIONER OF REVENUE
FOR THE STATE OF NORTH CAROLINA**

**APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH
CAROLINA**

FILED APRIL 24, 1941.

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[Caption omitted]

IN SUPERIOR COURT OF WAKE COUNTY**BEST & COMPANY, INC.,****v.****A. J. MAXWELL, Commissioner of Revenue**

Before Frizzelle, J., January 16, 1939, Term, Wake Superior Court. Defendant Appealed

Summons dated June 11, 1938, showing service June 14, 1938, appears in original record.

COMPLAINT

The plaintiff, complaining of the defendant, alleges:

1. That the plaintiff is a corporation organized and existing under the laws of the State of New York.

2. The defendant is the Commissioner of Revenue for the State of North Carolina, and at the times hereinafter mentioned was acting as such; that the defendant is a resident of Wake County, North Carolina.

3. The defendant has demanded and under threat of legal process has collected from the plaintiff the sum of \$250.00 alleged to be due by the plaintiff as a license tax under section 121 of Chapter 127 of the Public Laws of 1937, otherwise designated as C. S. 7880 (51), and particularly under paragraph (e) thereof, imposing a license tax upon the persons, firms and corporations not being regular retail merchants in the State of North Carolina who display sam- [fol. 3] ples, goods, wares or merchandise in any hotel room or in any house, rented or occupied temporarily for the purpose of securing orders for the retail sale of such goods, wares or merchandise.

4. Section 121 of Chapter 127 of the Public Laws of 1937, otherwise designated as C. S. 7880 (51) and particularly subsection (e) thereof, and such other parts of the said section as relate to subsection (e) thereof, are unconstitutional, null and void, for that they are in contravention of the Constitution of the United States, particularly

the commerce clause, being Article I, Section 8, paragraph 3 thereof, the privileges and immunities clauses, being Article IV, Section 2, and the equal protection of law clause, being Amendment Fourteen, Section 1 thereof; that the demand made upon the plaintiff and the collection from the plaintiff of \$250.00 pursuant to the said section of the Revenue Act was therefore without authority of law.

5. The plaintiff paid to the defendant the full amount of the tax demanded under the aforementioned section, to-wit, \$250.00, on or about the 9th day of February, 1938; that the defendant was the proper officer to whom such tax, if owed, should be paid; that the plaintiff notified the defendant in writing that it paid the said tax under protest, that the said payment was made under threat of legal process and without prejudice to the plaintiff's right to recover the said tax; that within 30 days thereafter, to-wit, on or about the 16th day of February, 1938, the plaintiff in writing demanded of the defendant the return of the sum of \$250.00 paid as aforesaid; that the defendant, on or about the 18th day of February, 1938, declined in writing to comply with such demand and refund the said sum of \$250.00 or any part thereof to the plaintiff; that more than 90 days has elapsed since the plaintiff demanded of the defendant the return of the sum of \$250.00, and more than 90 days has [fol. 4] elapsed since the defendant declined in writing to return the said sum of \$250.00, and that the defendant still refuses to return to the plaintiff the said sum of \$250.00, or any part thereof.

Wherefore, the plaintiff prays that it recover of the defendant the sum of \$250.00, together with interest thereon from the 9th day of February, 1938; for the costs of this action, and for such other and further relief as to the Court may seem just and proper.

Manly, Hendren & Womble, Counsel for Plaintiff.

(Verified June 4, 1938, by Alfred W. Niles, Treasurer of plff., at State of New York, City of New York.)

Order permitting plaintiff to file amended complaint, and dated Sept. 29, 1938, appears in the record, consented to by Manly, Hendren & Womble and T. W. Bruton, counsel for defendant.

IN SUPERIOR COURT OF WAKE COUNTY

AMENDED COMPLAINT

With leave of Court, the plaintiff files the following Amended Complaint in lieu of the original complaint filed herein:

1. The plaintiff is a corporation organized and existing under the laws of the State of New York.

2. The defendant is the Commissioner of Revenue for the State of North Carolina, and at the times hereinafter mentioned was acting as such; that the defendant is a resident of Wake County, North Carolina.

3. The defendant has demanded and under threat of legal process has collected from the plaintiff the sum of \$250.00 alleged to be due by the plaintiff as a license tax under section 121 of Chapter 127 of the Public Laws of 1937, otherwise designated as C. S. 7880 (51) and particularly under paragraph (e) thereof, imposing a license tax upon the persons, firms and corporations not being regular retail [fol. 5] merchants in the State of North Carolina, who display samples, goods, wares or merchandise in any hotel room or in any house, rented or occupied temporarily for the purpose of securing orders for the retail sale of such goods, wares or merchandise.

4. The plaintiff conducts a retail merchandise establishment and has its principal office and place of business at 372 Fifth Avenue, New York, N. Y., and is not a regular retail merchant in the State of North Carolina within the meaning of section 121 of Chapter 127 of the Public Laws of 1937, otherwise designated as C. S. 7880 (51); that on or just prior to February 9, 1938, the plaintiff, through its representative, rented a display room for a few days in the Robert E. Lee hotel in the City of Winston-Salem, and there displayed certain samples of its merchandise for the purpose of securing orders for such merchandise at retail sale; that the plaintiff's representative, on or about February 9, 1938, took orders for merchandise, samples of which were so displayed, and transmitted the said orders to the plaintiff's principal place of business in New York, where such orders were either accepted or rejected; that one or more orders so taken were accepted by the plaintiffs in New York,

and the said orders so accepted were filled by forwarding the merchandise ordered from the plaintiff's stock in the City of New York by mail or parcel post to the customer or customers in North Carolina; that such orders were not given, accepted or filled for wholesale trade; that in no instance did the representative aforementioned actually sell or deliver any merchandise in the State of North Carolina, but took orders only subject to acceptance by the plaintiff at its principal office in New York; that invoices for merchandise so displayed, ordered, accepted and shipped were sent by the plaintiff to the customer or customers directly from its place of business in New York City; that all collections therefor were made by the plaintiff through its office in New York City directly from the customer or customers from whom the several orders were taken; that the plaintiff's representative displaying samples of merchandise at the Robert E. Lee Hotel in Winston-Salem, North Carolina, had no ownership whatsoever in the merchandise displayed or in the merchandise out of which the order or orders taken by him were filled; that the license tax referred to in article 3 hereof collected from the plaintiff by threat of legal process was assessed by reason of the transactions herein described.

5. Section 121 of Chapter 127 of the Public Laws of 1937, otherwise designated as C. S. 7880 (51) and particularly subsection (e) thereof, and such other parts of the said section as relate to subsection (e) thereof, are unconstitutional, null and void, for that they are in contravention of the Constitution of the United States, particularly the commerce clause, being Article I, Section 8, paragraph 3 thereof; the privileges and immunities clauses, being Article IV, Section 2; and the equal protection of law clause, being Amendment Fourteen, Section 1 thereof; that the demand made upon the plaintiff and the collection from the plaintiff of \$250.00 pursuant to the said section of the Revenue Act was therefore without authority of law.

6. The plaintiff paid to the defendant the full amount of the tax demanded under the aforementioned section, to-wit, \$250.00, on or about the 9th day of February, 1938; that the defendant was the proper officer to whom such tax, if owed, should be paid; that the plaintiff notified the defendant in writing that it paid the said tax under protest; that the said payment was made under threat of legal process

and without prejudice to the plaintiff's right to recover the said tax; that within 30 days thereafter, to-wit, on or about the 16th day of February, 1938, the plaintiff in writing de-[fol. 7] manded of the defendant the return of the sum of \$250.00 paid as aforesaid; that the defendant on or about the 18th day of February, 1938, declined in writing to comply with such demand and refund the said sum of \$250.00, or any part thereof to the plaintiff; that more than 90 days has elapsed since the plaintiff demanded of the defendant the return of the sum of \$250.00, and more than 90 days has elapsed since the defendant declined in writing to return the said sum of \$250.00, and that the defendant still refuses to return to the plaintiff the said sum of \$250.00, or any part thereof.

Wherefore, the plaintiff prays that it recover of the defendant the sum of \$250.00, together with interest thereon from the 9th day of February, 1938; for the costs of this action; and for such other and further relief as to the Court may seem just and proper.

Manly, Hendren & Womble, Counsel for Plaintiff.

(Verified Aug. 23, 1938, at State of New York, City of New York, by Alfred W. Miles, Vice-Pres. of plaintiff.)

IN SUPERIOR COURT OF WAKE COUNTY

ANSWER

The defendant A. J. Maxwell, Commissioner of Revenue, answering the complaint of the plaintiff, says:

1. The allegations contained in paragraph 1 are admitted.
2. The allegations contained in paragraph 2 are admitted.
3. Answering paragraph 3, this defendant says that as Commissioner of Revenue he demanded and collected from the plaintiff the sum of \$250.00 due by it as a license tax levied under section 121 (e) of Chapter 127 of the Public Laws of 1937, which imposes a license tax upon persons, firms or corporations not being regular retail merchants in the State of North Carolina, who display samples, goods, wares, or merchandise in any hotel room or in any house [fol. 8] rented or occupied temporarily for the purpose of

securing orders for the retail sale of such goods, wares or merchandise, which is the only tax levied by the State of North Carolina against this plaintiff. Except as herein admitted, all other allegations in this paragraph are denied.

4. Answering paragraph 4, the defendant admits that the plaintiff conducts a retail merchandise establishment and has its principal office and place of business at 372 Fifth Avenue, New York City, and is not a regular retail merchant in the State of North Carolina; that on or just prior to February 9, 1938, the plaintiff rented a display room for a few days in the Robert E. Lee Hotel in the City of Winston-Salem, and there displayed certain samples of its merchandise for the purpose of securing orders for the retail sale of such merchandise; that the plaintiff on or about February 9, 1938, took orders for merchandise, samples of which were so displayed, and the said orders were filled from the plaintiff's stock in the City of New York by mailing the same to customer or customers in North Carolina; that such orders were not given, accepted or filled for wholesale trade; that in no instance was the merchandise actually delivered at the time of the display, or the giving of the order; that such orders taken, as above described, were taken only subject to acceptance by the plaintiff at its principal office in New York; that invoices for merchandise so displayed, ordered, accepted and shipped were sent by the plaintiff to the customer or customers directly from its place of business in New York City; that the man in charge of the plaintiff's display of samples of merchandise at the Robert E. Lee Hotel in Winston-Salem had no ownership whatsoever in the merchandise displayed, or in the merchandise out of which the order or orders taken at Winston-Salem were filled. Except as herein admitted, all other allegations in paragraph 4 are denied.

[fol. 9] 5. Paragraph 5 of the complaint is denied.

6. Paragraph 6 of the complaint is admitted, except that it is denied that the tax in controversy in this action was paid by the plaintiff under threat of legal process.

Further Answering and for a Further and More Complete Defense, this defendant alleges:

That on or about February 9, 1938, the plaintiff rented a display room in the Robert E. Lee Hotel in the City of

Winston-Salem and there displayed certain of its merchandise for the examination of the buying public, making the display in the same manner as regular retail merchants in the City of Winston-Salem and, both before and at the time said display was being made, by advertising in the same manner as regular retail merchants, invited the buying public to make purchases of merchandise; that the plaintiff had, at that time, no regular place of business in the State of North Carolina and was not a regular retail merchant within the State of North Carolina; that the State of North Carolina, through section 121(p) of Chapter 127 of the Public Laws of 1937, levied a tax of \$250.00 upon the plaintiff for the use of such space, for the display of the goods, wares and merchandise of the plaintiff, and that said tax is the only tax levied by the State of North Carolina against the plaintiff, or against other persons, firms or corporations operating in the State of North Carolina in like manner.

Harry McMullan, Attorney General. T. W. Bruton, Assistant Attorney General. R. H. Wettach, Assistant Attorney General. L. O. Gregory, Assistant Attorney General. I. M. Bailey, Amicus Curiae.

(Verified Nov. 14, 1938.)

[fol. 10] IN SUPERIOR COURT OF WAKE COUNTY

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the plaintiff and the defendant that the following, or so much thereof as the Court may deem relevant and material to the proper determination of the issues herein, shall constitute the facts in the case upon which the issues shall be determined and judgment rendered.

1. That the plaintiff was at the times mentioned in the complaint a New York corporation. The defendant was at the times mentioned in the complaint the Commissioner of Revenue for North Carolina and acted as the Commissioner of Revenue for North Carolina in all matters referred to in the complaint.

2. That on February 9, 1938, the plaintiff, pursuant to a demand made upon it by the defendant under section 121 (e) of Chapter 127, Public Laws of 1937, otherwise identified as C. S. 7880 (51) (e), paid to the defendant the sum of \$250.00; that at the time of making such payment the plaintiff notified the defendant in writing that the said payment was made under protest; that the plaintiff has complied fully with all of the requirements of Section 836 of Chapter 127 of the Public Laws of 1937, otherwise identified as C. S. 7880 (194).

3. That the plaintiff conducts a retail merchandise establishment and has its principal office and place of business at 372 Fifth Avenue, New York City, and is not a regular retail merchant in the State of North Carolina; that on or just prior to February 9, 1938, the plaintiff rented a display room for a period of several days in the Robert E. Lee Hotel in the City of Winston-Salem and there displayed certain samples of its merchandise for the purpose of securing orders for the retail sale of such merchandise; that the plaintiff on or about February 9, 1938, took orders for merchandise, samples of which were displayed, and the said [fol. 11] orders were filled from the plaintiff's stock of merchandise in the City of New York by mailing the same to customer or customers in North Carolina; that such orders were not given, accepted or filled for wholesale trade; that in no instance was the merchandise actually delivered at the time of the display or the giving of the order; that such orders taken as above described were taken subject to acceptance by the plaintiff at its principal office in New York; that invoices for merchandise so displayed, ordered, accepted and shipped were sent by the plaintiff to the customer or customers directly from its place of business in New York City; that the merchandise displayed was for the examination of the buying public and was displayed upon tables or racks within the space rented by the plaintiff in the Robert E. Lee Hotel; that the plaintiff advertised the display of its merchandise in the Robert E. Lee Hotel through notices mailed to prospective purchasers which were sent out in advance of the display of the merchandise; that the plaintiff had at that time no regular place of business in the State of North Carolina; that the State of North Carolina, through Section 121 (e) of Chapter 127 of Public Laws of 1937, levied the tax of \$250.00 upon the plaintiff under the

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provisions of said section, and said tax is the only tax levied by the State of North Carolina against the plaintiff or against other persons, firms or corporations operating in the State of North Carolina in like manner.

This the 26 day of January, 1939.

Manly, Hendren & Womble, W. P. Sandridge, Counsel for Plaintiff. Harry McMullan, Counsel for Defendant, Attorney General. T. Wade Bruton, Assistant Attorney General. R. H. Wettach, Assistant Attorney General. Lee O. Gregory, Assistant Attorney General. (Signed) I. M. Bailey, Amicus Curiae.

IN SUPERIOR COURT OF WAKE COUNTY

JUDGMENT

This Cause coming on to be heard and being heard before the undersigned Judge Presiding at the January 16, 1939, Term of the Superior Court of Wake County, and being heard upon the pleadings and a stipulation of facts as appear of record; and the plaintiff and the defendant having been represented by counsel, and the Court having fully considered arguments of counsel, the Court is of the opinion that plaintiff is entitled to recover of the defendant the sum of \$250.00, with interest thereon from the 9th day of February, 1938;

Now, therefore, it is Considered, Ordered and Decreed that the plaintiff recover of the defendant the sum of \$250.00, with interest at six per cent from the 9th day of February, 1938, and that the costs of this action be taxed against the defendant.

J. Paul Frizzelle, Judge Presiding.

IN SUPERIOR COURT OF WAKE COUNTY

APPEAL ENTRIES

To the signing and entry of the foregoing judgment the defendant excepts and appeals to the Supreme Court of North Carolina. Notice given in open court, further notice

waived. It is stipulated and agreed that the record on appeal shall be composed of the following: Summons, com-[fol. 13] plaint, order, amended complaint, stipulations, judgment, appeal entries and assignments of error.

W. H. Sawyer, C. S. C. Wake County.

IN SUPERIOR COURT OF WAKE COUNTY

STIPULATION RE APPEAL ENTRIES

By stipulation of the parties, through their attorneys, it is agreed that the appeal entries may be signed by the Clerk of the Superior Court.

Consented to.

Manly, Hendren & Womble, Attorneys for Plaintiff.
Harry McMullan, Attorney General. T. Wade Bruton, Assistant Attorney General, of counsel for the defendant. I. M. Bailey, Amicus Curiae.

IN SUPERIOR COURT OF WAKE COUNTY

DEFENDANT APPELLANT'S EXCEPTION AND ASSIGNMENT OF ERROR

The defendant appellant makes the following exception and assignment of error in the appeal to the Supreme Court from the judgment appearing in the record:

1. For that the Court erred in signing and entering the said judgment as set forth in the record, which judgment is erroneous as a matter of law, upon the stipulation of facts appearing in the record.

This constitutes defendant appellant's Exception and Assignment of Error No. 1.

Harry McMullan, Attorney General; T. Wade Bruton, Assistant Attorney General, of counsel for defendant. I. M. Bailey, Amicus Curiae.

(Transcript certified by clerk Superior Court.)

A true copy.

Edward Murray, Clerk of the Supreme Court of North Carolina. (Seal of the Supreme Court of the State of North Carolina.)

[fol. 14] IN SUPREME COURT OF NORTH CAROLINA

No. 463

BEST & COMPANY, INC.,

v.

A. J. MAXWELL, Commissioner of Revenue

Appeal by defendant from Frizzelle, J., January 16 Term, 1939, Wake Superior Court. Reversed.

This is a civil action to recover \$250.00 in taxes paid defendant, under protest, by virtue of Chapter 127, Sec. 121, subsec. e (Revenue Act, 1937), of the Public Laws of 1937. It is agreed by the parties that plaintiff is not a regular retail merchant in North Carolina and has no regular place of business in this State; but that plaintiff is a New York corporation having its principal office in New York City. It is likewise agreed that just prior to February 9, 1938, plaintiff rented for several days a display room in the Robert E. Lee Hotel, in Winston-Salem, and there displayed samples and secured retail orders for merchandise, later filled by shipment from the New York office, and that the tax here in dispute was levied upon this activity of plaintiff.

From a judgment for the plaintiff in the sum of \$250.00, with interest, defendant appealed to this Court. The only exception and assignment of error is to the signing of the judgment.

Manly, Hendren & Womble and W. P. Sandridge for plaintiff. Atty.-General McMullan and Asst. Attys.-General Bruton Wettach, and Bailey & Lasser, amicus curiae, for defendant.

OPINION—Filed June 16, 1939

CLARKSON, J.

The only question raised by this appeal: Is the State tax upon the display of samples, goods, etc., (a) in a hotel room, or house rented or occupied temporarily, (b) for the purpose of securing orders for the retail sale of such goods, etc., (c) by a person, firm or corporation, not a regular

retail merchant in the State, invalid as violative of the Commerce Clause of the Constitution of the United States, Art. 1, Sec. 8 (3)? We think not.

[fol. 15] The Act is not challenged as violative of any other provision of either the State or Federal Constitutions. The single question presented for our determination: Does the facts in this case violate the constitutional grant to Congress of the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes?" This clause, and the remainder of the Federal Constitution, is significantly lacking in any prohibition of the taxation of commerce carried on within the borders of any state, and the right of the State to tax such intra-state commerce is not questioned. Further, the Federal Constitution nowhere expressly prohibits the taxation of interstate commerce by a State, or even its direct regulation. The Commerce Clause merely gives to Congress the power to "regulate" commerce among the States. It is well to remember that the Federal Government is one of granted power only; the Tenth Amendment to the Constitution (and North Carolina would not ratify the Constitution until the Bill of Rights had been adopted) declares, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people." The "Commerce Clause" has come to be written in capital letters rather by reason of more recent judicial interpretation of the clause than by the clear, expressed intent of the constitutional fathers. The express retention by the States of powers not delegated to the Federal Government argues strongly against the existence of any implied power of the Federal Government (growing out of the Commerce Clause) to strike down a state tax on commercial activity carried on within the borders of the taxing state. Unless the implied prohibition of taxes definitely burdening interstate commerce (developed and given expression in *Robbins v. Taxing District*, 120 U. S. 489, *Real Silk Hosiery Mills Co. v. Portland*, 268 U. S., 325, and numerous interim cases) reaches to, and renders immune from state taxation, the commercial activity here taxed, the instant case represents a valid exercise of the state taxing [fol. 16] power. The Supreme Court of the United States has long recognized the force of these considerations and has heretofore indicated that implied prohibitions growing out of the Commerce Clause must, necessarily, be reluc-

tantly and rarely applied. "Whatever amounts to a more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of danger and meet it. This Court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effects upon it are clearly non-existent." *Stafford v. Wallace*, 258 U. S. 495 (521); *Board of Trade v. Olsen*, 262 U. S. 1 (37); see also *Walton v. State of Missouri*, 91 U. S. 275. Nor, by the same standard, can it be presumed that the Supreme Court of the United States will substitute its judgment as to the valid exercise of a state legislature's taxing power for that of the state legislature, unless the tax act "clearly" and "unduly" burdens the "freedom of interstate commerce." " * * * Property within the state, privileges granted by the state, and intra-state commerce done within the state are uniformly held proper subjects of state taxation." Powell. "Indirect encroachments on Federal Authority by the Taxing Powers of the States, 5 Selected Essays on Constitutional Law", at p. 391; also see pp. 418, 470.

• It then becomes pertinent to determine whether it can be fairly said that the instant act, in this case, clearly constitutes a direct and undue burden upon interstate commerce. The measure is clear and concise; before it is applicable there must be the following requisites set forth in the law: (a) the act, i. e. the display of samples, goods, etc., (b) the place, i. e. in a hotel room of temporarily occupied house, (c) the mental element, or purpose, i. e., for the purpose of securing orders for retail sale of the goods, etc., and (d) the person, i. e., one not a regular merchant. In essence, [fol. 17] the tax is one imposed upon anyone, not otherwise taxed as a retail merchant, who uses a North Carolina hotel room or temporarily occupied house, for commercial display purposes in the interest of retail sales. It is a use tax, levied in the State of North Carolina upon profitable and commercial activity which has otherwise escaped taxation and which, therefore, discriminates against no one but seeks to remove a discrimination previously existing against regular, taxed, retail merchants. Under this statute the act taxed must occur in North Carolina, and the room where the act transpires must be within the State. The taxed activity

must be directed at the retail trade in North Carolina, seeking to reach personally the citizens and residents of this State. The measure does not in any way impinge upon the activities of the wholesale trade, nor does it discriminate against non-residents. All citizens and residents of North Carolina, and non-residents alike, (other than retail merchants who have already been taxed for their commercial activities) who engage in the taxable activity are liable for the tax. The taxed act is a local one, involving the use of purely local property. The tax in no way hampers the movement of the samples, goods, etc., or of the merchandise sold, in interstate commerce. The tax in no way regulates the inter-state or out-of-state activity of the person seeking to sell by display in North Carolina, nor does it in any way interfere with sales by sample by house-to-house canvassers. Finally, the measure leaves open to the seller the choice as to the manner of soliciting retail sales by display; only when he seeks to localize his commercial activity by temporarily establishing himself at a particular rented and temporary location within this State in his activity in displaying samples and seeking orders subjected to taxation. Although such activity may be in the twilight zone of interstate commerce, it does not enter that enchanted realm. Although such displaying by sample may ultimately result in orders which will flow into inter-state commerce, such commercial activity cannot cloak itself in immunity from [fol. 18] taxation merely by calling the magic words "Interstate Commerce." The use of North Carolina real estate for the purpose of displaying samples is commercially intended to result in inter-state commerce, but this preliminary activity is merely a separate and distinct effort of the seller seeking, as in the instances of magazine and billboard advertising, to stimulate the desire for the seller's goods. *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250.

The display use of hotel rooms and temporarily rented property here taxed is not a usual, necessary, or essential part of a commercial, retail business. It is a preliminary and incidental activity which, at the election of the seller, may or may not transpire prior to the beginning of the flow of events which constitute the movement of goods in interstate commerce. There is a striking analogy here to production, which has consistently been held not to constitute inter-state commerce. *Carter v. Carter Coal Co.*, 298 U. S.

238. As Justice Brandeis, speaking for the Court in *Chasaniol v. Greenwood*, 291 U. S. 584 (587), so aptly remarked with reference to ginning and warehousing cotton, these are but "steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce." The use of North Carolina realty to display samples is likewise but a step "in preparation for the sale and shipment in interstate commerce," and is essentially intra-state and local in nature. As was said by Justice Bradley in *Coe v. Errol*, 116 U. S. 517 (525), "There must be a point of time when they cease to be governed exclusively by domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of origin to that of their destination." Justice Bradley was there speaking of certain logs hauled to a river, but if the orders sought by plaintiff is substituted as the res under [fol. 19] consideration the logic of the proposition is compelling that certainly not earlier than the actual placing of the orders with plaintiff can its commercial activity be considered as a part of interstate commerce. No phase of the question is better settled than the fundamental that the mere fact that the products of domestic enterprise are ultimately intended to become subjects of interstate commerce is not sufficient to stamp them with the immunities attaching to interstate commerce proper. *Kidd v. Pearson*, 128 U. S. 1 (21); *Heisler v. Thomas Colliery Co.*, 260 U. S. 245 (259); *Champion Refining Co. v. Corporation Commission*, 286 U. S. 210 (235).

The displaying of samples in temporary quarters, here taxed, was peculiarly a local and intra-state act, outside the realm of interstate commerce, because such term can "never be applied to transactions wholly internal, between citizens of the same community, or to a polity and laws whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such community." *Veazie et al. v. Moore*, 14 How. 568 (573). Such a local, business activity which is separate and distinct from the transportation and intercourse which is interstate commerce is not freed from state taxation "merely because in the ordinary course such transportation or intercourse is induced by the business."

Western Live Stock v. Bureau of Revenue, 303 U. S. 250 (253), and cases cited. In the same case, at p. 254, Justice Stone, speaking for the Court, reiterates the fundamental that, "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way. Postal Telegraph-Cable Co. v. Richmond, 249 U. S. 252 (259), 39 S. Ct. 265, 266, 63 L. Ed. 590,'" and other cases cited. In the Western Live Stock case, supra, the state privilege tax was upheld under a view which we think equally applicable here, to-wit, that "the burden on interstate business is too remote and too attenuated."

[fol. 20] A casual reading of many of the recent pronouncements of the Supreme Court of the United States apparently indicates a gradual broadening of the Federal power over interstate commerce by liberalizing the definition of what falls within that category, with an accompanying, and even more desirable, broadening of the states' taxing power over matters touching the fringe of the garment of interstate commerce. This latter tendency is indicated by two complementary but distinct developments, the one marked by a narrowing of the compass of what constitutes a direct and undue burden on interstate commerce, and the other by a stricter and more rigid interpretation as to what constitutes discrimination against interstate commerce. See "Sales and Use Taxes: Interstate Commerce Pays Its Way," Warren & Schlesinger, 38 Col. Law Rev. 49 (Jan. 1938), for a collection of a number of these cases. These developments argue strongly for the validity of the instant tax.

In Coverdale v. Pipe Line Co., 303 U. S. 604, a state tax upon the production of power to drive gas into interstate commerce was approved. The displaying of goods here taxed is merely a similar preliminary activity seeking to "drive" orders into interstate commerce. In Nashville, C. & St. L. Ry. Co. v. Wallace, 288 U. S., 249, a state tax on storage of gasoline brought into the state through interstate commerce and ultimately used directly in interstate commerce was upheld, such a tax being considered too remote and too indirect a burden upon interstate commerce to justify its being stricken down. Here we have a similar situation, a local, commercial activity within North Carolina

which follows the arrival of plaintiff's representative and precedes the sending of any orders to plaintiff. In *Southern Pac. Co. v. Gallagher*, 59 S. Ct., 389 (decided Jan. 30, 1939), the California Use Tax was upheld as applicable to equipment bought out of the State and brought into the State for installation on interstate, transportation equipment; there Justice Reed, for the Court, found a "taxable moment" at the point where the goods came to rest in the State and before they were installed on the interstate equipment. In the instant case there is no need for such search for a tax-[fol. 21] able moment, as the taxed activity was clearly localized in North Carolina; the displaying of the samples was part of a carefully planned campaign, after an elaborate; personalized canvass by mail of large numbers of North Carolina citizens who were considered potential customers. As was pointed out in the *Gallagher* case, *supra*, "A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress." Also, it was there said: "The taxable event is the exercise of the property right in California"; here the taxable event is the exercise of the temporary property right in the hotel room or rented house to display samples commercially for retail purposes. *Pacific Telephone & Telegraph Co. v. Gallagher*, 59 S. Ct. 396, a companion case decided on the same day, again approved the California Use Tax as applied to supplies brought into the State for use in interstate telephone and telegraph communication.

Even earlier, in *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U. S., 147, and in *Henneford v. Silas Mason Co.*, 300 U. S., 577, the validity of the fundamental theory of the modern "use tax" had been approved; in the latter case, Justice Cardozo, for the Court, used these significant words in concluding the opinion: "A legislature has a wide range of choice in classifying and limiting the subjects of taxation. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S., 232 (237); *Ohio Oil Co. v. Conway*, 281 U. S. 146 (159). The choice is as broad where the tax is laid upon one or a few of the attributes of ownership as when laid upon them all. *Flint v. Stone Tracy Co.*, 220 U. S., 107 (158-9). * * * Such questions of fiscal policy will not

be answered by a Court. The legislature might make the tax base as broad or as narrow as it pleased."

[fol. 22] The Courts have not been alone in noting the economic imperative that "interstate business must pay its way". Students of taxation have become increasingly aware that a judicial over-emphasis upon the doctrine of immunity of interstate commerce from state taxation amounts to discrimination against intra-state business. Lutz, H. L., *Public Finance*, 3rd ed., (1936), p. 326. State tax administrators have found it difficult to reach taxpayers in interstate commerce even when the plain and obvious intent was to tax them on the same basis as those engaged in intra-state commerce. R. M. Haig, "The Co-ordination of the Federal and State Tax Systems," *Proceedings of the National Tax Association*, (1932), p. 220; Marvel Stockwell, "The Co-ordination of Federal, State and Local Taxation," *The Tax Magazine*, (April, 1938), p. 198-9. None too soon, perhaps, the Supreme Court of the United States appears to have adopted a new approach to the problem of state taxation as it relates to interstate commerce, an approach involving a new emphasis upon the preservation of equality of tax burden between competing business enterprises. See William B. Lockhart, "The Sales Tax in Interstate Commerce," 52 *Harvard Law Review* (Feb. 1939), p. 617.

The tax here discussed is a part of a comprehensive, state tax program designed to reach and to tax equally and fairly all types of commercially remunerative activity which has the protection of our laws. Local mercantile businesses, which for the most part are small, are subject to taxation; the commercial activity of plaintiff, which is a comparatively large business enterprise, has heretofore escaped taxation in the State. If this tax fails in its effort to secure from plaintiff its proportionate contribution in taxes for the privileges and protections which it enjoys within the State, the immunity of plaintiff from taxes in this State will be complete. The reasoning leading to such a result we do not find persuasive. We do not find in the grant of power to Congress to regulate interstate commerce any implied prohibition which strikes down the tax here levied. Rather do we find in the reservation to the State of powers not [fol. 23] granted to the United States (U. S. Constitution, X Amendment), coupled with the retention in the people of this State of "all powers not delegated" by our Constitu-

tion (N. C. Constitution, Art 1, sec. 37), a mandate of organic law which is compelling in its implications. "In selecting the objects of taxation, in the classification of business and trades for this purpose, and in allocating to each its proper share of the expenses of government, the General Assembly has been given a wide discretion. The continued maintenance of government itself as a great communal activity in behalf of all the citizens of the State is dependent upon an adequate taxing power." Tobacco Co. v. Maxwell, Commissioner of Revenue, 314 N. C., 367 (371-2).

For the reasons given, the judgment of the Court below is Reversed.

Seawell, J., took no part in the consideration or decision of this case.

Stacy, C. J., dissents:

A. True Copy.

Edward Murray, Clerk of the Supreme Court of North Carolina. (Seal of the Supreme Court of the State of North Carolina.)

[fol. 24] [File endorsement omitted.]

[fols. 25-26] IN SUPREME COURT OF NORTH CAROLINA

BEST & COMPANY, INC.,

vs.

A. J. MAXWELL, Comm'r of Revenue

JUDGMENT—June 16, 1939

This cause came on to be argued upon the transcript of the record from the Superior Court of Wake County: upon consideration whereof, this Court is of opinion that there is error in the record and proceedings of said Superior Court.

It is, therefore, considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable Heriot Clarkson, Justice, be certified to the said Su-

perior Court, to the intent that the Judgment is Reversed. And it is considered and adjudged further, that the plaintiff do pay the costs of the appeal in this Court incurred, to-wit, the sum of Fifty-one & 35/100 dollars (\$51.35), and execution issue therefor.

A true copy.

Edward Murray, Clerk of the Supreme Court.
(Seal of the Supreme Court of the State of North Carolina.)

[fol. 27] IN SUPREME COURT OF NORTH CAROLINA.

[Title omitted]

PETITION FOR REHEARING—Filed July 25, 1939

Now comes Best & Company, Inc., plaintiff appellee, and respectfully petitions the Court to rehear the appeal in this case, and upon such rehearing (a) to affirm the judgment of the Superior Court of Wake County, or (b) at least correct the statements contained in the opinion of the Court to the effect that the Act in question is not challenged as violating any constitutional provision except the Commerce clause of the Constitution of the United States, to the end that the opinion may show that the Act was challenged upon the record and in the plaintiff's brief as violating the Equal Protection of Law clause of the Constitution of the United States, and was challenged by its petition to rehear as violating the Due Process of Law clause of the Constitution of the United States.

Summary of Facts

The plaintiff commenced an action in the Superior Court of Wake County against A. J. Maxwell, Commissioner of Revenue, to recover \$250.00 representing a tax paid by the [fol. 28] plaintiff petitioner under protest, levied by Chapter 127, Sec. 121, subsection (e) (Revenue Act of 1937), of the Public Laws of 1937, together with interest thereon. Judgment was rendered in favor of the plaintiff and against the defendant in the Superior Court of Wake County. The defendant appealed from the judgment of the Superior Court of Wake County to this Court, and on June 16, 1939,

this Court reversed the judgment of the Superior Court of Wake County, and an opinion was filed on the same date written by Mr. Justice Clarkson. Mr. Chief Justice Stacy dissented therefrom, and Mr. Justice Seawell took no part in the consideration or the decision of the appeal.

Matter Overlooked by Court

The opinion filed herein expressly states in the first paragraph that the only question raised on appeal was whether or not the taxing act in question violated the Commerce clause of the Constitution of the United States, Article I, Sec. 8(e). This statement is reiterated elsewhere in the opinion of the Court. The plaintiff petitioner respectfully avers that the Court overlooked certain other contentions of your petitioner respecting the invalidity of the taxing act in question as offending against the Constitution of the United States, in that it is expressly alleged in Article 4 of the complaint (R. p. 2) and Article 5 of the amended complaint (R. p. 5) that the taxing act in question violates the Privileges and Immunities clause of the Constitution of the United States, being Article IV, Sec. 2, and the Equal Protection of Law clause of the Constitution of the United States, being Amendment Fourteen, Section 1, as well as the Commerce clause referred to and dealt with in the opinion of the Court. The brief of the plaintiff appellee deals with the Equal Protection of Law clause and the Privileges and Immunities clause of the Constitution of the United States (see page 15). Your petitioner also avers that when this appeal came on for oral argument in this Court, counsel [fol. 29] arguing the case for the plaintiff appellee called the Court's attention to all contentions set forth in this brief, but for want of time the contentions of the plaintiff appellee respecting the Privileges and Immunities clause and the Equal Protection of Law clause were not fully developed.

The plaintiff appellee now recognizes that its contention that the taxing act in question violates the Privileges and Immunities clause of the Constitution of the United States is not sound, the said clause having been construed as not applicable to corporations, but it is believed that the contention made by the plaintiff appellee that the taxing act in question violates the Equal Protection of Law clause of the Constitution of the United States is well founded.

Error Committed

Your petitioner respectfully avers that this Court committed an error of law in its judgment reversing the judgment of the Superior Court of Wake County, in that:

1. This Honorable Court's decision construes the tax in issue to be a "use tax" for the use of local property despite the fact that (A) the very same section which imposes the tax denominates it a "privilege tax" "for the privilege of displaying such samples" (Sec. 121(e)); and (B) the statute specifically says that the tax is imposed as "State license tax for the privilege of carrying on the business, exercising the privilege, or doing the act named," and that the license which is issued shall "constitute a privilege to conduct the business named" (Sec. 100).

Upon the principle of *noscitur a sociis* all parts of the same section and chapter should be read in unison. Each of the taxes imposed by Chapter 127 is a privilege or license [fol. 30] tax: *Caldwell v. North Carolina*, 187 U. S. 622, and Sec. 121 (in which is contained the tax in issue) is captioned "Peddlers", each subdivision of which imposes a tax for the privilege of engaging in the business of peddling, hawking, itinerant selling, etc. Manifestly the disputed tax should not be isolated from all the others and denominated something entirely different—something directly opposite to what the Legislature has expressly provided.

A use tax is "a tax upon property after importation is over;" it is a property tax upon the privilege of use, which is one of the attributes of ownership: *Henneford v. Silas Mason Co.*, 300 U. S. 577, pp. 582, 586. None of those elements is present in the display of samples in a hotel room rented temporarily for the purpose of securing orders for retail sale. What property imported by plaintiff into North Carolina is made the base of the tax? Did plaintiff import the hotel room into North Carolina, and what rights of ownership does it have therein?

The decision herein wisely cautions against the dangers that lurk in the use of catch words and labels, e. g., "interstate commerce". By the same token, calling the tax in issue a "use tax" does not obliterate the fact that it is a direct burden upon interstate commerce and one of the means by which that commerce is carried on. See *Henneford Case*, *Supra*, p. 586.

Whether or not a State law or tax imposed thereunder deprives a party of rights secured by the Federal Constitution depends not upon the construction or characterization of the act by the State Court, but upon its practical operation and effect: *Stewart D. G. Co. v. Lewis*, 294 U. S. 550, 555; *American Mfg. Co. v. St. Louis*, 250 U. S. 459, 462-3; *Crew L. Co. v. Penn.*, 245 U. S. 292, 294.

The decision herein denominates the tax a "use tax" to [fol. 31] distinguish it from those numerous State license, privilege and occupation taxes which have been invalidated by the Supreme Court of the United States. But the distinction is transparent. The statute here involved levies a privilege tax, furnishing only a new method of exaction. It is at most a change of form without any change in substance, in order to accomplish the same old prohibited result: *Alpha C. Co. v. Mass.*, 268 U. S. 203, 217-218.

A State cannot under the guise of a license tax or any other type or form of tax called by an attractive name impose burdens upon interstate commerce transacted within its limits. Such taxation amounts to a regulation of commerce, which belongs solely to Congress. Any State law is unconstitutional and void which requires a party either to take out a license for carrying on interstate commerce or to engage in any of the pursuits by which that commerce is carried on. *Alpha C. Co. v. Mass.*, *Supra*; *Crutcher v. Ky.*, 141 U. S. 47; *Brennan v. Titusville*, 153 U. S. 289, 299; *Stockard v. Morgan*, 185 U. S. 27; *International T. Co. v. Pigg*, 217 U. S. 91, 112; *Crenshaw v. Ark.*, 227 U. S. 389; *Leloup v. Mobile*, *Supra*; *Ling v. Michigan*, 135 U. S. 161, 166; *Caldwell v. North Carolina*, *Supra*; *Ozark P. L. Co. v. Monier*, 266 U. S. 548; *Helson & R. v. Ky.*, *Supra*, at p. 249; *Fisher's B. S. Inc. v. Tax Commission*, 297 U. S. 650, 655-6.

"neither licenses nor indirect taxation of any kind, nor any system of State regulation, can be imposed upon interstate commerce any more than upon foreign commerce; and . . . all acts of legislation producing any such result are, to that extent, unconstitutional and void."

Crutcher v. Ky., *Supra*, at p. 62.

Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves: *Brennan v. Titusville*, [fol. 32] *Supra*, at p. 303; *Welton v. Mo.*, 91 U. S. 275, 278. A tax on the display of articles for the purpose of securing

orders for the retail sale of such goods in interstate commerce is in effect a tax on the business of selling merchandise in interstate commerce: *Brown v. Md.*, 12 Wheat. 419, 444. The exaction of a license tax as a condition of doing any particular business is a tax on the occupation; and a tax on the occupation of doing a business is a tax on the business itself: *McCall v. Cal.*, 136 U. S. 104, 108-9; *Leloup v. Mobile*, *Supra*, at p. 645; *Real Silk Mills v. Portland*, 268 U. S. 325, 335; *Leisy v. Hardin*, 135 U. S. 100, 123; *Cooney v. Mountain S. T. & T. Co.*, 294 U. S. 384, 392; *Bingaman v. Golden Eagle Lines*, 297 U. S. 626; *Helson & R. v. Ky.*, 279 U. S. 245, 250.

2. The decision herein is directly contrary to numerous decisions of the Supreme Court of the United States holding that a merchant of goods, which are legitimate subjects of commerce, who carries on his business in one State, can send an agent into another State to display samples of his merchandise and solicit orders therefor without paying to the latter State a tax for the privilege of thus trying to sell the goods. A license tax or any tax which falls directly upon the use of one of the means by which commerce is carried on is a direct burden on interstate commerce. Mr. Justice Holmes, more than 30 years ago, held that the law on this subject "is established": *Robbins v. Shelby*, 120 U. S. 489; *Asher v. Texas*, 128 U. S. 129; *Stoutenburg v. Hennick*, 129 U. S. 141; *Crutcher v. Ky.*, 141 U. S. 47; *Brennan v. Titusville*, 153 U. S. 289; *Stockard v. Morgan*, 185 U. S. 27; *Caldwell v. North Carolina*, 187 U. S. 622; *Rearick v. Penn.*, 203 U. S. 507; *Dozier v. Alabama*, 218 U. S. 124; *Crenshaw v. Arkansas*, 227 U. S. 389; *Rogers v. Arkansas*, 227 U. S. 389; *Rogers v. Arkansas*, 227 U. S. 401; [fol. 33] *Davis v. Va.*, 236 U. S. 697; *Real Silk Mills v. Portland*, 268 U. S. 325.

These authorities and the principle for which they stand have not fallen into "innocuous desuetude," nor have they become old, dry and stale. On the contrary, they have received the uniform approval of the Supreme Court of the United States up to the very latest decisions of that Court: *Southern Pacific Co. v. Gallagher*, 306 U. S. 167, 174; *Gwin v. Henneford*, 305 U. S. 434, 437, 441; *South Carolina v. Barnwell*, 303 U. S. 177, 185, 186; *Cooney v. Mountain S. T. & T. Co.*, 294 U. S. 384, 392; *Minn. v. Blasius*, 290 U. S. 1, 9; *Texas T. Co. v. New Orleans*, 264 U. S. 150—dissent by

Justices Brandeis and Holmes, which however also cited with approval the authorities above referred to.

See, also, *Cheney Bros. v. Mass.*, 246 U. S. 147, 153-154; *McCall v. Cal.*, 136 U. S. 104, 108-111.

In the *Cheney Bros. Case*, *Supra*, a Connecticut corporation was held not to be subject to a Massachusetts excise tax despite the fact that it maintained a selling office within the latter State, solicited and took orders subject to approval by the home office, and shipped merchandise directly to the purchaser. The Court held as follows, at p. 153:

"We do not perceive anything in this that can be regarded as a local business as distinguished from interstate commerce. *The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation.*" (Italics ours.)

In the *Gwin v. Henneford Case*, *Supra*, the question was [fol. 34] whether a Washington tax measured by the gross receipts of the appellant therein from its business of marketing fruit shipped from Washington to the places of sale in various States, and in foreign countries, was a burden on commerce in violation of the Constitution. The Supreme Court of Washington held that the shipment of fruit from the state of origin to points outside and its sale there involved interstate commerce, but that appellant's activities in Washington in promoting the commerce were a local business subject to State taxation. In reversing this contention, Mr. Justice Stone held at p. 437:

"We need not stop to consider which, if any, of appellant's activities in carrying on its business are in themselves transportation of the fruit in interstate or foreign commerce. For the Entire Service for which the Compensation is Paid is in Aid of the Shipment and Sale of Merchandise in that Commerce. Such Services are within the Protection of the Commerce Clause, *Robbins v. Shelby County Taxing District*, 120 U. S. 489; *Caldwell v. North Carolina*, 187 U. S. 622; *Real Silk Mills v. Portland*, 268 U. S. 325."

Practically every State Court of last resort has recognized the authority and inherent correctness of these de-

cisions; attached hereto is a schedule setting forth a list of some of the State Court decisions. The latest decision (decided subsequent to the case at bar) involved Best & Company, Inc., the plaintiff herein, and a South Carolina statute almost precisely identical to the one in issue herein; a copy of that decision is likewise annexed hereto.

[fol. 35] 3. This Honorable Court's decision holds that plaintiff's activities in North Carolina are purely local in nature and separate and distinct from plaintiff's interstate transactions, and that the tax in issue does not therefore violate the commerce clause, since it only affects intrastate business.

It is respectfully submitted that the decision overlooks the fact that the orders solicited by plaintiff in North Carolina required and contemplated for their fulfillment transactions conceded to be in interstate commerce, with resulting delivery through the channels of interstate commerce direct from New York to the customers in North Carolina.

The display in North Carolina was exclusively in furtherance of the admitted interstate activities of the plaintiff, and was the means by which that business was done. By its very nature plaintiff's method of transacting business transcends State lines, involving the constant use of the channels of interstate commerce, and consisting of purchasing merchandise in one State, finding customers for it in other States, making contracts of sale, and transporting the merchandise direct from the home State of plaintiff into the State in which the customers are situated.

The protection against the imposition of burdens upon interstate commerce is practical and substantial, drawn from the course of business, and extending to whatever is necessary to the complete enjoyment of the right protected. It is based upon broader considerations than the existence of technically binding contracts or the time and place where title passed, and includes all the means and instruments by which such commerce is carried on. The display of samples, the solicitation of orders, and the negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce and a State may not levy a tax or impose any other restraint thereon. Such restrictions affect the very foundations of interstate com-

merce: *Robbins v. Shelby*, and other cases cited *supra*, at p. 2.

See, also, *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 515; *Delamater v. S. Dak.*, 205 U. S. 93, 97, 100-101; *Ozark P. L. Co. v. Monier*, 266 U. S. 555, 565.

Concededly there is a point of time when the immunity ceases and the power of the State to tax commences. But equally obvious is it that that point of time is not reached when the taxpayer is actively engaged in negotiating sales of goods which are located in another State for direct shipment to the purchaser. *Brown v. Md.*, 12 Wheat. 419, 441.

The decision herein holds that plaintiff's activities in North Carolina bear an analogy to production, "which has consistently been held not to constitute interstate commerce." In support of that proposition there is cited the case of *Carter v. Carter Coal Co.*, 298 U. S. 238 (Justices Cardozo, Brandeis and Stone dissenting). In that case it was held that the steps leading to the production of the coal did not constitute commerce; but with equal clarity the Court pointed out that all negotiations for the disposal of the coal and all the means and instruments by which it was sold were subjects of interstate commerce. Moreover, in the Labor Board cases, 301 U. S. 1, 49 and 58, and in *Edison Company v. Labor Board*, 305 U. S. 197, which were decided after the Carter case, the local productive activities of industrial concerns and utilities were held to constitute interstate commerce.

[fol. 37] 4. This Honorable Court's decision holds that the instant tax is non-discriminatory, applicable to residents and non-residents alike, and intended to remove a previously existing discrimination against local merchants.

The generality of an exaction will not save it if it directly burdens interstate commerce, which cannot be taxed even though a tax should be laid on commerce carried on solely within the State: *Robbins v. Shelby*, *supra*, 497; *Brennan v. Titusville*, *supra*; *Cooney v. Mountain S. T. & T. Co.*, 294 U. S. 384, 393; *Pacific T. & T. Co. v. Tax Commission*, 297 U. S. 403, 411-412; *Adams Mfg. Co. v. Storen*, 304 U. S. 307, 312.

The tax in issue is, however, discriminatory and that was unquestionably one of its objects. (*The Raleigh Times* 9-22-37—"Political Pin Wheel").

A regular merchant of North Carolina is not subject to the tax if he conducts a hotel display. And, assuredly, one who is not a merchant would have no occasion to exhibit samples for the purpose of obtaining orders, as he is not in the business of selling merchandise.

Curiously, peddlers and all other itinerant salesmen pay taxes ranging from \$15.00 to \$100.00, whereas \$250.00 is the fee for hotel displays.

"It would not be difficult, however, to show that the tax authorized by the State of Tennessee in the present case is discriminative against the merchants and manufacturers of other states. They can only sell their goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no [fol. 38] occasion for such agents, and, if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a state can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it."

Robbins v. Shelby, 120 U. S. at p. 498.

The statute authorizes the imposition on plaintiff of taxes aggregating \$750.00. (State, county and municipal) for conducting a 2 or 3 day exhibit of a necessarily limited number of articles which can be displayed within the confines of a hotel room and if plaintiff conducts exhibits in other

cities and towns in North Carolina, it is subject to an additional tax of \$250.00 for each county and town.

It must be borne in mind that the plaintiff is subject to all the taxes imposed upon corporations in its home State of New York.

To carry on interstate commerce is not a franchise or privilege granted by the State; it is a right which every person is entitled to exercise under the laws of the United States: *Crutcher v. Ky.*, 141 U. S. 47, 57; *International T. Co. v. Pigg*, 217 U. S. 91, 109-110; *Sprout v. South Bend*, 277 U. S. 163, 171; *Helson & R. v. Ky.*, 279 U. S. 245, 249.

The invalidation of the statute in issue as applied to plaintiff's activities does not deprive North Carolina of any taxes to which it is justly or properly entitled: *Robbins v. Shelby*, supra, at pp. 496-497.

If there is any problem to be remedied, it is up to the Federal Congress to do so. State legislation, such as the statute in issue, would cause precisely those problems which the constitutional provision was designed to eliminate, and every town, city and State would ultimately have a Chinese wall around it. *Brown v. Md.*, 12 Wheat. 419, 444-6; *Caldwell v. N. Car.*, supra; *Welton v. Mo.*, 91 U. S. 275, 280-281; *Stafford v. Wallace*, 258 U. S. 495, 518, 519; *Helson & R. v. Ky.*, supra, 251; *Gwin v. Henneford*, 305 U. S. 434, 440.

5. The tax deprives plaintiff of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States because, as pointed out in point 4, supra, it effects a direct, arbitrary and gross discrimination against plaintiff and in favor of other merchants, especially resident merchants, similarly situated.

The plaintiff appellee, in its complaint, amended complaint and in its brief asserted the unconstitutionality of the taxing act in question upon the ground that it violated the Commerce clause, the Privileges and Immunities clause (now abandoned) and the Equal Protection of Law clause of the Constitution of the United States. The errors alleged to have been committed by the Court upon these questions [fol. 40] have already been discussed in this petition. In addition, the plaintiff appellee feels that the taxing act in question offends against the Due Process of Law clause of the Constitution of the United States, being Amendment

XIV, Sec. 1, a point not heretofore specifically raised. The plaintiff appellee now asserts as an additional error:

6. The statute in issue exerts the taxing authority of the State over property and rights which are wholly beyond the confines of the State and not subject to its jurisdiction and, therefore, constitutes a taking of plaintiff's property without due process of law in violation of the Fourteenth Amendment, in that plaintiff's activities constitute interstate commerce, pure and simple, and are not a privilege granted by the State and the tax is in effect, a tax upon plaintiff's goods which are situated outside of the State of North Carolina. *Looney v. Crane Co.*, 245 U. S. 178, 187; *Allgeyer v. Louisiana*, 165 U. S. 832.

The judgment complained of has been fully performed and the costs paid. The plaintiff appellee submits herewith certificates of two members of the Bar of this Court who have no interest in the subject matter of this action and have never been of counsel for either party to this action, each of whom have been, for more than five years, a member of the Bar of this Court, to the effect that they have carefully examined the case and the law bearing thereon and the authorities cited in the opinion, and that they believe the Court has overlooked certain contentions of the plaintiff appellee, and that they deem the judgment and the opinion filed herein erroneous.

Wherefore, your petitioner prays that the Court rehear this appeal and affirm the judgment of the Superior Court of Wake County, or, failing this, that the Court correct the [fol. 41] statement contained in its opinion to the effect that the Act in question was not challenged as violating any constitutional provision except the Commerce clause of the Constitution of the United States, to the end that the opinion may show that the Act was challenged as violating the Equal Protection of Law clause of the Constitution of the United States upon the record and in the plaintiff's brief and that the Act is challenged by this petition to rehear as violating the Due Process of Law clause of the Constitution of the United States.

Manly, Hendren & Womble, W. P. Sandridge, Counsel for Plaintiff Appellee.

Duly sworn to by Alfred W. Miles. Jurat omitted in printing.

[fol. 42] STATE COURT DECISIONS

Alabama:

Lee v. Lafayette, 153 Ala. 675;
Beard v. Union & American Publishing Co., 71 Ala.
60;
Miller v. State, 7 Ala. App. 183;
Ware v. Hamilton Brown Co., 92 Ala. 145;
Leverett v. Garland, 206 Ala. 556;
Citizens Nat. Bank v. Bucheit, 71 So. 82;
Crum v. Prattville, 155 Ala. 154;
Ineichen v. Anniston, 10 Ala. App. 605;
Ex parte Murray, 93 Ala. 78.

Arkansas:

Gunn v. White Sewing Machine Co., 57 Ark. 24;
Coblentz & Logsdon v. Powell, 148 Ark. 151;
Sillin v. Hessig-Ellis Drug Co., 181 Ark. 386;
Temple v. Gates, 186 Ark. 820.

California:

International Trust Co. v. Leschen, 41 Cal. 299;
Charlton Silk Co. v. Jones, 190 Cal. 341;
Ex parte Thomas, 71 Cal. 204.

Colorado:

Salvage v. Central Elec. Co., 59 Colo. 66;
Pueblo v. Larkins, 63 Colo. 197;
Wilcox v. People, 46 Colo. 382.

Florida:

Myers v. Miami, 100 Fla. 1537.

Georgia:

Crump v. McCord, 154 Ga. 147;
Dennison Mfg. Co. v. Wright, 156 Ga. 789;
Smith v. Nolting First Mortgage Corp., 45 Ga. App.
253;
Stone v. State, 117 Ga. 292.

Idaho:

Belle City Mfg. Co. v. Frizzell, 11 Ida. 1;
 Toledo Computing Scale Co. v. Young, 16 Ida. 187;
 In re Kinyon, 9 Ida. 642.

[fol. 43] Illinois:

Booz v. Texas & Pac. Ry. Co., 250 Ill. 376;
 Pembleton v. Illinois C. M. A., 289 Ill. 99;
 March Davis Cycle Mfg. Co. v. Strobridge, 79 Ill.
 App. 683;
 Havens & Geddes Co. v. Diamond, 93 Ill. App. 557;
 Lehigh Portland Cement Co. v. McLean, 245 Ill.
 326;
 American Sales Book Co. v. Wemple, 168 Ill. App.
 639;
 Frank Prox Co. v. Bryan, 185 Ill. App. 322;
 American Art Works v. Chicago Picture Frame
 Works, 246 Ill. 610;
 Holzman v. Canton, 180 Ill. App. 641.

Indiana:

McLaughlin v. South Bend, 126 Ind. 471;
 Martin v. Rosedale, 130 Ind. 109;
 Huntington v. Mahan, 142 Ind. 695.

Iowa:

Burnham Mfg. Co. v. Queen Stove Works, Inc., 214
 Ia. 112.

Kansas:

State v. Hickox, 64 Kan. 650;
 City of Kensley v. Dyerly, 79 Kan. 1.

Kentucky:

Commonwealth v. Read Phosphate Co., 113 Ky. 32;
 Commonwealth v. Eclipse Hay Press Co., 31 Ky. L.
 R. 824;
 Commonwealth v. Hogan M. & T., 25 Ky. L. R. 41;
 Louisville Trust Co. v. Bear S. S. B. Co., 166 Ky.
 744;
 Commonwealth v. Baldwin, 29 Ky. L. R. 1074;
 Lawton v. Stewart, 247 S. W. 14.

Louisiana:

Simmons Hdw. Co. v. McGuire, 39 La. Ann. 842;
 McClellan v. Pettigrew, 44 La. Ann. 356;
 State v. Schofield, 136 La. 702.

[fol. 44] Maine:

Royster Guano Co. v. Cole, 115 Me. 387.

Massachusetts:

Carstairs v. O'Connell, 154 Mass. 357;
 James Thurman v. Chicago M. & St. P. Ry. Co., 254
 Mass. 569.

Michigan:

Fifth Avenue Society v. Hastie, 155 Mich. 56;
 Colt & Co. v. Sutton, 102 Mich. 324.

Mississippi:

Saxony Mills v. Wagner, 94 Miss. 233;
 Overton v. Vicksburg, 70 Miss. 558.

Missouri:

Bauch v. Weber Flour Mills, 210 Mo. App. 666;
 German-American Bank v. Smith, 202 Mo. App. 467;
 Fleming v. Mexico, 262 Mo. 432;
 Kansas City v. McDonald, 175 S. W. 917;
 International Textile Co. v. Gillespie, 229 Mo. 397;
 General Excavator v. Emory, 40 S. W. (2d).

Nebraska:

Menks v. State, 70 Neb. 669.

Nevada:

Ex parte Rosenblatt, 19 Nev. 439.

New Hampshire:

Campbell v. U. S. Radiator Corp., 167 Atl. 1050.

New Jersey:

Shephurst v. Borough of Avon, 128 Atl. 232;
 Funk & Wagnalls Co. v. Stamm, 85 N. J. L., 301;
 Wood & Selick, Inc. v. American Grocery Co., 96
 N. J. L. 218;
 Dickerson v. Levine, 98 N. J. L. 313.

[fol. 45] Oklahoma:

Auto Trading Co. v. Williams, 71 Okla. 302;
 Wells Co. v. Howard & Co., 50 Okla. 776;
 Kubby v. Cubie H. Co., 41 Okla. 116;
 Baxter v. Thomas, 46 Pac. 479.

Oregon:

Endicott Johnson & Co. v. Multnomah County, 96
 Ore., 679;
 Bertin & L. v. Mattison, 69 Ore. 470;
 Spaulding v. McNary, 64 Ore. 49;
 Chicago Portrait Co. v. Bellingham, 270 F. 584;
 Vermont F. M. Co. v. Hall, 80 Ore. 308.

Pennsylvania:

Commonwealth v. American Tobacco Co., 173 P. 531;
 Mearshorn & Co. v. Pottsville Lumber Co., 187 Pa.
 12;
 Putney Shoe Co. v. Edwards, 60 Pa. Super. Ct. 338;
 Hitchner W. P. & P. Co. v. Shoemaker, 75 Pa. Super.
 Ct. 520.

Rhode Island:

Berger v. Penn. Ry. Co., 27 R. I. 583.

South Carolina:

City of Lauren v. Elmore, 55 S. C. 477.

South Dakota:

State v. Delamater, 20 S. D. 23.

Tennessee:

Hurford v. State, 91 Tenn. 669;
State v. Scott, 98 Tenn. 254.

Texas:

North v. Mergenthaler L. Co., 77 S. W. (2d) 580;
Louis v. Irby C. & T. Co., 45 S. W. 476;
Harkins v. State, 75 S. W. 26
Turner v. State, 41 Tex. Crim. 545.

[fol. 46] Utah:

Parke Davis & Co. v. Fifth Judicial District Court,
77 P. (2d) 466;
Utah v. Holtgreve (1921) 26 A. L. R. 707.

Vermont:

State v. Pratt, 59 Vt. 590.

Virginia:

Commonwealth v. Castner C. & B. 138 Va. 81;
Adkins v. Richmond, 98 Va. 91.

Washington:

Rich v. Chicago B. & Q. Ry. Co., 34 Wash. 14;
State v. Glasky, 50 Wash. 598.

West Virginia:

Pennywitt v. Blue, 73 W. Va. 718;
State v. Lichtenstein, 44 W. Va. 99.

Wisconsin:

Loverin & B. Co. v. Travis, 135 Wis. 322;
American Slicing Machine Co. v. Jaworski, 179 Wis.
634.

Wyoming:

State v. Byles, 22 Wyo. 136;
Clements v. Casper, 4 Wyo. 494;
State v. Willingham, 9 Wyo. 290.

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA,
County of Richland:

THE STATE

v.

J. YETTER, Defendant

DECISION

This case comes before me on appeal from the Court of Magistrate Wm. A. Gunter of Richland County from a conviction and sentence of the defendant charged with violation of Act 705, page 1569, Acts of the General Assembly of 1938. The pertinent part of the Act that the defendant is [fol. 47] charged with violating is as follows:

"Section 1. License for Temporary Display of Samples, Goods, Wares or Merchandise Secure Sales at Retail.—Be it enacted by the General Assembly of the State of South Carolina: That every person, firm or corporation not being a regular retail merchant in the State of South Carolina who shall display samples, goods, wares or merchandise in any hotel room or in any room or house rented or occupied temporarily for the purpose of securing orders for the retail sale of such goods, wares or merchandise so displayed, shall apply for in advance and procure a state license from the South Carolina Tax Commission for the privilege of displaying such samples, goods, wares or merchandise, and shall pay an annual privilege tax of two hundred and fifty (\$250.00) Dollars, which license shall entitle such person, firm or corporation to display such samples, goods, wares or merchandise in any county of this State; provided, that this Act shall not apply to displays of samples, goods, wares or merchandise at conventions, expositions or fairs."

The Act provides that one convicted of violating its terms shall be punishable by a fine not exceeding one hundred (\$100.00) dollars, in addition to the payment of the license or by imprisonment not exceeding thirty (30) days.

The agreed facts are: that the defendant is not a regular retail merchant in the State of South Carolina; that at the

times alleged in the warrant he was displaying samples, goods, wares or merchandise in a room in the Columbia Hotel, Columbia, South Carolina, which had been rented or occupied for the purpose of securing orders for the retail sale of such goods, wares or merchandise. It was testified to by the defendant, and not denied or contradicted by the State, that he was a resident of the State of New York; that his salary and expenses were paid direct from the New York office; that he only took orders for goods, which orders [fol. 48] were forwarded to New York to be filled and the goods shipped by mail to the customer; that the defendant received no money or payment from the customer, and made no deliveries, but only solicited orders for goods desired from the samples displayed; that the persons invited to see the samples were those selected by the New York office and notified of the display of the goods by that office; that collection for the orders filled was left to the New York office.

Upon the trial of the defendant, the Magistrate found him guilty of violating the Act in question, and imposed sentence upon the defendant in accordance with the Act. It is from this judgment and sentence that the defendant appeals to this Court, on the following grounds: "That the Magistrate erred in finding the defendant guilty because the Statute in question, Act 705 of 1938, is unconstitutional, null and void in that it interferes with interstate commerce and is in violation of Article I, Section VIII of the Constitution of the United States, and that it abridges the privileges and immunities of citizens of the United States and deprives the defendant of his liberty and property without due process of law and denies to the defendant equal protection of the laws in violation of Article XIV, Section 1, of the Constitution of the United States and Article I, Section 5, of the Constitution of South Carolina."

The defendant has not argued the contention of the unconstitutionality of the Act under the due process clauses of the State and Federal Constitution; therefore, this Court will not consider the appeal upon those grounds.

Both appellant and respondent have relied upon the effect of "the interstate commerce clause" of the Federal Constitution as controlling the termination of this case. The only question to be decided is, whether or not Act 705, Acts of the General Assembly of 1938, imposes a burden or restriction upon interstate commerce as prohibited by Arti-

[fol. 49] cle I, Section VIII of the Constitution of the United States?

Section VIII, sub-division 3, of Article I of the Federal Constitution, delegates to the Congress of the United States the power "to regulate commerce with foreign nations, and among the several States and with the Indian Tribes." This commerce among the several States has been defined in the case of *State v. Holleyman*, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567, 11 L. R. A. (N. S.) 552, 24 L. R. A. (N. S.) 175, A. L. R. 1094, thus:

"Interstate commerce ordinarily consists of three elements, to-wit: (1) The purchasing of merchandise by a resident of one State from a resident of another State; (2) the delivery of the articles of commerce; and (3) the transportation thereof. The purchase may be made by the buyer in person, *or through a traveling salesman of the non-resident, or by an order sent by the purchaser to the non-resident.* The delivery may be made directly to the purchaser when the goods are sold, or when they reach their destination, in cases where they have been consigned to him." (Italics added.)

The facts in the case at bar squarely fit the foregoing definition: The defendant in the instant case was a traveling salesman for the non-resident seller; he took the order for the merchandise, forwarded it to the non-resident seller who in turn shipped it from the foreign State to the resident purchaser in this State and delivery was made by the carrier. Each element of the definition of interstate commerce is present in this transaction and, as I view it, each step is a necessary link in the chain. It is argued that the tax as imposed is not for soliciting business or for taking orders but for the privilege of displaying the goods in a temporary show room and therefore, does not impose a burden or restriction on interstate commerce. I cannot agree with this theory. Each act done by this defendant was a related and necessary step in the consummation of [fol. 50] a transaction in interstate commerce. It is true that the defendant's principal does not have to come into this State to transact business and the clear intent of this Act is to discourage, to say the least, his doing so, however, it is his right to do so and the Article of the Constitution here invoked was specifically included so that such busi-

ness or commerce could be freely transacted between residents of the several States without hindrance and burden.

In the conclusion I have reached, I am amply supported by the decisions of our Supreme Court and the United States Supreme Court. In the Holleyman case, *supra*, the defendant, and others were transporting liquor from North Carolina to their homes in this State after dark, in their own vehicles; they were arrested in this State for violation of a Statute which prohibited transporting liquor in the State after dark. Upon appeal from the conviction, our Supreme Court, by divided opinion, upheld the conviction, but upon rehearing before an en banc Court, this decision was reversed and likewise the judgment of the lower Court. The sole point in issue in that case, as here, was whether or not such a Statute was prohibited by the interstate commerce clause of the Federal Constitution and the final decision resolved that question in the defendant's favor? In the case just referred to, the defendant, a resident of South Carolina, purchased and received in North Carolina a package of liquor and was transporting same from that State to this State in his own vehicle. Our Supreme Court held that while the liquor was being transported and until the defendant arrived at his home, he was engaged in interstate commerce and to arrest Holleyman and confiscate the liquor was such a burden upon that commerce as is prohibited by the commerce clause of the Federal Constitution.

Under very similar facts as in the case at bar, the United [fol. 51] States Supreme Court, in the case of *Robbins v. Taxing District of Shelby County (Tennessee)*, 120 U. S. 489, 30 L. Ed. 694, held that a Statute, similar to the one here involved, was unconstitutional as repugnant to the "Commerce Clause." In that case the Court fixes the point at which a transaction becomes interstate commerce, using this language:

"But to tax the sale of such goods, or the offer to sell them before they are brought into the State is a very different thing and seems to me clearly a tax on interstate commerce itself, * * * *The negotiation of sales of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made is interstate commerce.*" (Italics added.)

In the case at bar, the displaying of samples of goods to be purchased in another State is an element in the negotia-

tion for the sale, and, therefore, constitutes interstate commerce. With facts and Statutes very similar to the case at bar, the United States Supreme Court has consistently held those Statutes to be restrictions upon interstate commerce and therefore, invalid. *Stockard v. Morgan*, 185 U. S. 27, 46 L. Ed. 785; *Crenshaw v. Arkansas*, 227 U. S. 389, 57 L. Ed. 565; *Brennan v. City of Titusville (Penn.)*, 153 U. S. 288, 38 L. Ed. 719; *State v. Emert*, 130 Mo. 241, 23 Am. St. Rep. 874, 156 U. S. 296, 39 L. Ed. 430; *Real Silk Hosiery Mills v. City of Portland (Ore.)* 268 U. S. 325, 69 L. Ed. 982.

In the case of *State v. Emert*, supra, the Missouri Supreme Court held: "the sale of goods which are in another state at the time of sale for the purpose of introducing them into the State, which a regulation concerning their sale is made, is interstate commerce, and a tax upon them before they are brought into the State is a tax on interstate commerce. The imposition of a license tax on the person so making sale of them is also, in effect, a tax upon the goods, [fol. 52] and illegal, because the State cannot tax goods beyond its jurisdiction; but as soon as the goods are brought into the State, and have become a part of its general mass of property, they become taxable the same as other similar property within the State." This holding of the Missouri Court was affirmed by the United States Supreme Court.

In *Brennan v. City of Titusville*, supra, the very question here presented was passed upon and it was there held that a regulation as to the manner of sale of subjects of commerce, whether by sample or not, and by exhibiting samples is a regulation of commerce and that an ordinance requiring a license of a manufacturer of goods in carrying on his business in another State by sending his agents there to solicit orders, conflicts directly upon the provisions of the Federal Constitution regulating interstate commerce which is within the exclusive jurisdiction of the Federal Government. Mr. Justice Brewer, delivering the opinion of the Court, said:

"It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed

by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

Again quoting from the same authority: "It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business; but is a direct charge and burden upon that business; and if a [fol. 53] State may lawfully exact it, it may increase the amount of the execution until all interstate commerce in this mode ceased to be possible. And, notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent regulate it."

The Court reviewed numerous decisions in which it had passed upon similar questions and held that the license tax imposed in that case upon the defendant was a direct burden on interstate commerce and was, therefore, beyond the power of the State.

The respondent relies strongly upon the case of *Best & Company, Inc. v. A. J. Maxwell*, Commissioner of Revenue, decided by the Supreme Court of North Carolina, and filed June 16th, 1939, to sustain the validity of our Act on the same subject. The main provisions of the North Carolina Act are identical with ours, and the North Carolina Court held their Act to be constitutional. Notwithstanding in this case, like in the case before this Court, the facts were similar. The North Carolina decision was not concurred in by the entire Court, but I have not before me the dissenting opinion.

The writer holds the decisions of our sister State in the highest regard, but he finds himself unable to concur in the opinion of that Court upon the question here presented. In view of the numerous decisions of the United States Supreme Court, holding that the statute of this kind under the facts in the instant case, places a burden upon interstate commerce in contravention of the Federal Constitution, he finds himself in disagreement with the North Carolina decision.

There being a Federal question herein involved, it is to the decisions of the United States Supreme Court that we

must look for the proper interpretation of the commerce [fol. 54] clause of the Federal Constitution upon the subject that is here being dealt with. And, reluctant as this Court is to declare an Act of our Legislature unconstitutional, it has no alternative, in view of the decisions heretofore cited, as well as others, than to hold that the Act in question, insofar as it is attempted to be applied to the defendant in the instant case, under the facts here presented, clearly contravenes the Federal Constitution by placing a burden upon and attempting to regulate interstate commerce. It, therefore, follows, that the defendant has, under the facts in this case, been convicted under a statute which as to him is void.

The following cases from our own Court bear very strongly upon the question involved in the instant case: *Jewel Tea Company, Inc. v. City of Camden*, 171 S. C. 353, 172 S. E. 307; *Zeigler v. Puritan Mills*, 188 S. C. 367, 199 S. E. 420.

It Is, Therefore, Ordered, Adjudged and Decreed that Act 705, Acts of the General Assembly 1938, page 1569, insofar as it is attempted to be applied in this particular case, is unconstitutional and of no force or effect.

It Is Further Ordered that the judgment of the Magistrate's Court in the instant case be, and the same is reversed and that the defendant be discharged.

G. Duncan Bellinger, Resident Judge Fifth Judicial Circuit.

Columbia, S. C., July 12, 1939.

CERTIFICATE OF H. G. HUDSON

I Hereby Certify that I have been a member of the Bar of the Supreme Court of North Carolina for more than five years, and that I have never been of counsel to either party in the case of *Best & Company, Inc. v. A. J. Maxwell*, Commissioner of Revenue, and that I have no interest in the sub-[fol. 55] ject matter of this action. I further certify that I have carefully examined this case and the law bearing thereon and the authorities cited in the opinion, together with the record and briefs, and I am of the opinion:

(a) That the plaintiff, as shown by the record and its brief, asserted that the taxing act in question applying to

the plaintiff's business violates the Privileges and the Immunities Clause of the Constitution of the United States and the Equal Protection of Law Clause of the Fourteenth Amendment of the Constitution of the United States. I am of the opinion that the Privileges and Immunities Clause is not applicable. The Court has overlooked the issue raised by the pleadings and by the plaintiff's brief as to the violation of the Equal Protection of Law clause.

(b) The judgment of the Court is erroneous in reversing the Superior Court of Wake County and in upholding the constitutionality of Public Laws of 1937, Ch. 127, Sec. 121, subsection (e), being the Revenue Act of 1937. I am of the opinion that the Act constitutes, as applied to the plaintiff's business, a regulation of and taxation of interstate commerce in violation of the Constitution of the United States, and that it also deprives the plaintiff of equal protection of the law under the Fourteenth Amendment for the reasons set out in the pleadings, the plaintiff's brief and the petition to rehear. I think that the Act in question particularly deprives the plaintiff of the equal protection of law in exempting a regular retail merchant engaging in the same business as the plaintiff. For instance, Ivey's of Charlotte could transact the same type of business at any place in the State without subjecting itself to the tax.

(c) I am also of the opinion that the Act in question, as [fol. 56] applied to the plaintiff, deprives the plaintiff of the property without due process of law. This point does not seem to have been made in the original brief, but some of the authorities cited in the original brief and in the petition to rehear sustain the proposition.

July 24, 1939.

H. G. Hudson.

CERTIFICATE OF RICHMOND RUCKER

I Hereby Certify that I have been a member of the Bar of the Supreme Court of North Carolina for more than five years, and that I have never been of counsel to either party in the case of Best & Company, Inc. v. A. J. Maxwell, Commissioner of Revenue, and that I have no interest in the subject matter of this action. I further certify that I have carefully examined this case and the law bearing thereon

and the authorities cited in the opinion, together with the record and briefs, and I am of the opinion:

(a) The Court overlooked the contentions of the plaintiff, as set out in the record and the plaintiff's brief, to the effect that the taxing act in question (P. L. 1937, Ch. 127, Sec. 121 (e)) applied to the facts of this case, as shown by the stipulation contained in the record, violates the Equal Protection of the Law clause of the Constitution of the United States (XIV Amendment, Sec. 1). And further, I am of the opinion that this contention of the plaintiff, set out in the pleadings and brief, is meritorious for the reason that the classification enumerated by the Act: "Every person, firm or corporation Not being a Regular retail merchant in the State" constitutes an unwarranted discrimination between Persons of this State and those of another State within its jurisdiction, the plaintiff being a person of New York State within the jurisdiction of this State.

[fol. 57] (b) I am further of the opinion that the judgment of the Court is erroneous in reversing the judgment of the Superior Court of Wake County and in upholding the constitutionality of that part of the taxing act (P. L. 1937, Ch. 127, Sec. 121 (b)), as applied to the facts disclosed by the record in that under the Commerce clause of the Constitution of the United States (Article I, Sec. 8, subsection 3), the exclusive power to regulate commerce is vested in Congress. As a consequence thereof, it is well settled that where the power of Congress to regulate is exclusive the failure of that body to enact specific legislation indicates its desire that the subject shall be free from any restrictions or impositions. It is manifest that the Legislature, by means of the device of a purported use tax, has undertaken to differentiate the tax in question from a license tax heretofore condemned by numerous decisions of the Supreme Court of the United States; however, the act construed from the point of view of what it actually accomplishes, as distinguished from what may have been the intent or purpose of the Legislature to accomplish, leads to the inevitable conclusion that its operative effect, applied to the facts of the record, constitutes a license tax. The decisions cited and relied upon by the plaintiff in its brief and petition to rehear seem to me to support this position.

(c) I am further of the opinion that the Due Process clause of the Constitution of the United States (XIV Amendment, Sec. 1) is violated by the decision of the Court for the reason that the taxing power of the State is here employed against activities affecting property interests of the plaintiff which are wholly beyond the confines of the State, and not subject to its jurisdiction.

Respectfully submitted, Richmond Rucker.

July 24, 1939.

[fol. 58] It is requested that the attached petition to rehear be referred by the Clerk of the Supreme Court of North Carolina to Mr. Justice Barnhill and Mr. Justice Winborne. Manly, Hendren & Womble, W. P. Sandridge, Attorneys for Plaintiff, Appellee.

July 25, 1939.

ORDER ALLOWING PETITION FOR REHEARING

Petition to rehear endorsed: "Petition considered and allowed., This September 30, 1939.

M. V. Barnhill, J. J. Wallace Winborne, J."

A true copy.

Edward Murray, Clerk of the Supreme Court of North Carolina. (Seal of the Supreme Court of the State of North Carolina)

[fol. 59] IN SUPREME COURT OF NORTH CAROLINA

No. 451—Wake

BEST & COMPANY, INC.,

v.

A. J. MAXWELL, Commissioner of Revenue

Petition to rehear this case reported in 216 N. C., 114.

Stratus, Reich & Boyer; M. James Spitzer; Manly, Hendren & Womble; and W. P. Sandridge for plaintiff, petitioner.

Attorney General McMullan and Asst. Attorneys General Bruton and Gregory, for defendant, respondent.
Bailey & Lassiter, amicus curiae.

OPINION—Filed February 2, 1940

CLARKSON, J.:

The petition deals with a matter of form and also with one of substance.

The petition alleges an inadvertence in the interpretation of petitioner's position in that it was stated that petitioner challenged the act only upon the ground that it violates the Commerce Clause of the Constitution of the United States, whereas petitioner likewise challenged the enactment as "Offending against the privileges and immunities and the equal protection of the law clauses of the Constitution of the United States." It is contended by respondents that those matters were dealt with in substance, though without specific mention, in the body of the former opinion. However, to this extent the petition is allowed.

The petition further alleges error in the construction of the statute. The Court being evenly divided on this phase of the petition, Seawell, J., not sitting, the petition is sustained only to the extent above indicated.

Petition dismissed in part and sustained in part.
Winborne, J., concurring in part and dissenting in part.
Stacy, C. J., and Barnhill, J., join in this opinion.

A true copy.

Edward Murray, Clerk of the Supreme Court of
North Carolina. (Seal of the Supreme Court of
the State of North Carolina.)

[fol. 60]

OPINION

WINBORNE, J., concurring in the partial allowance of the petition and dissenting from its dismissal in part:

The opinion heretofore filed in this case imputes to the statute a meaning not warranted by its terms. The construction is a forced one. It is conceded on all hands that if the tax is laid on the privilege of taking orders for goods to be shipped in interstate commerce, the act offends against the Constitution of the United States.

The provision of the act is that: "Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of displaying such samples, goods, wares, or merchandise, and shall pay an annual privilege tax of two hundred fifty dollars (\$250.00), which license shall entitle such person, firm or corporation to display such samples, goods, wares, or merchandise in any county in this State." P. L. 1937, Chapter 127, Section 121, subsection (e).

This is the exact language of the statute. It admits only of the interpretation that it is a tax on the privilege of taking orders for goods to be shipped in interstate commerce. The authorities are one in holding that such legislation is unconstitutional.

Nor can the construction heretofore given to the statute save it from constitutional offence. If the tax imposed be a "use tax", it is discriminatory. *Leonard v. Maxwell*, 216 N. C., 89.

Stacy, C. J., and Barnhill, J., join in this opinion.

A true copy.

Edward Murray, Clerk of the Supreme Court of North Carolina. (Seal of the Supreme Court of North Carolina.)

[fol. 61] [File endorsement omitted.]

[fol. 62] IN SUPREME COURT OF NORTH CAROLINA

BEST & COMPANY, INC.,

VS.

A. J. MAXWELL, Commissioner of Revenue

JUDGMENT—February 2, 1940

This cause came on to be argued upon the transcript of the record from the Superior Court of Wake County: upon consideration whereof,

It is adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable Heriod Clarkson, Justice, be certified to the said Superior Court, to the intent that the petition is dismissed in part and sustained in part.

And it is considered and adjudged further, that the Plaintiff do pay the costs of the appeal in this Court incurred, to-wit, the sum of Twenty-four and 70/100 dollars (\$24.70), and execution issue therefor.

A true copy.

Edward Murray, Clerk of the Supreme Court. (Seal
of the Supreme Court of the State of North Carolina.)

(Here follows 1 photolithograph, side folio 63.)

No 110388

THIS IS TO CERTIFY THAT THE PERSON, FIRM OR CORPORATION NAMED BELOW, HAVING PAID THE TAX REQUIRED BY LAW, LICENSE IS HEREBY ISSUED TO ENGAGE IN THE BUSINESS OR PRACTICE THE PROVISION OF

FROM JUNE 1, 1937 TO MAY 31, 1938

2-14-38

ADDITIONAL TAX OF \$2.50 WILL BE IMPOSED FOR FAILURE TO KEEP LICENSE PORTED OWNERSHIP NOT TRANSFERABLE



STATE OF NORTH CAROLINA

DEPARTMENT OF REVENUE

Sec. 121

Displaying Merchandise

Tax \$ 250.00

Penalty \$

Total \$

STATE WIDE LICENSE

East 2 Company, Inc.

New York, N. Y.

ISSUED BY COMMISSIONER OF REVENUE

A. D. Maxwell

COMMISSIONER

RI015

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[fol. 64] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE
STATE OF NORTH CAROLINA TO THE SUPREME COURT OF
THE UNITED STATES

To the Justices of the Supreme Court of the State of North
Carolina:

Your petitioner, Best & Company, Inc., respectfully
shows:

1. The petitioner is the plaintiff in the above entitled
cause and applicant for the allowance of an appeal to the
Supreme Court of the United States from the Supreme
Court of the State of North Carolina.

2. This suit was instituted by the petitioner in the Superior
Court of Wake County, North Carolina, against the
appellee above named as defendant to recover the sum of
\$250., together with interest thereon, which sum had been
paid by the petitioner to the appellee involuntarily and
under protest as tax under Section 121 (e) of Chapter 127
of the State of North Carolina Public Laws of 1937, C. S.
7880 (51) (e).

3. The complaint and the amended complaint allege that
the said statute is unconstitutional, null and void, in that
it contravenes inter alia Section 8 of Article I of, and Section
1 of the Fourteenth Amendment to, the Constitution of
the United States, and that the tax thus sought to be
recovered by the petitioner was exacted by the appellee
without authority of law.

4. After trial of the suit the Superior Court of Wake
[fol. 65] County rendered judgment in favor of the petitioner
for the full amount sought to be recovered.

5. On appeal from the said judgment to the Supreme
Court of the State of North Carolina the said judgment was
reversed by the said Supreme Court, and judgment was
entered by the said Supreme Court against the petitioner
and in favor of the appellee on the 16th day of June, 1939.

6. Thereafter the petitioner filed in the said Supreme Court a petition to rehear, which was allowed by the said Supreme Court a petition to rehear, which was allowed by Supreme Court on September 30, 1939, in which the petitioner prayed for a rehearing of the appeal on the merits and for correction of a statement contained in the original opinion of the said Supreme Court as to the federal questions raised by the petitioner; and the said Supreme Court disposed of the said application on the 2nd day of February, 1940, by granting the petition insofar as it sought to correct the statement contained in the original opinion of the said Supreme Court as to the federal questions raised by the petitioner and, on equal division of the Justices of the said Supreme Court, by denying a rehearing of the appeal on the merits. The judgment of the said Supreme Court thereby and on the 2nd day of February, 1940 became final for purposes of review by and appeal to the Supreme Court of the United States.

7. Thereafter the petitioner applied to the Supreme Court of the State of North Carolina to affirm the judgment of the Superior Court of Wake County, on the ground that an affirmance thereof was effected by the equal division of the Justices of the said Supreme Court upon the application for rehearing of the appeal on the merits; and the said application was denied.

[fol. 66] 8. The Supreme Court of the State of North Carolina is the highest Court of said State in which a decision in this suit could be had.

9. In said suit there is drawn in question the validity of a statute of the State of North Carolina, to wit: Section 121 (e) of Chapter 127 of the State of North Carolina Public Laws of 1937, C. S. 7880 (51) (e), on the ground of its being repugnant to the Constitution of the United States, in that it contravenes Section 8 of Article I of, and Section 1 of the Fourteenth Amendment to, the Constitution of the United States, and the decision is in favor of its validity.

10. The case is one in which, under the legislation in force when the Act of Congress of January 31, 1928, was passed, a review could be had in the Supreme Court of the United States on writ of error.

11. The errors upon which your petitioner claims to be entitled to an appeal are more fully set forth in the assignment of errors filed herewith; and there is likewise filed herewith a jurisdictional statement.

12. No previous application has heretofore been made herein for the allowance of an appeal to the Supreme Court of the United States, or for the other relief herein prayed for.

Wherefore, petitioner prays for the allowance of an appeal from the Supreme Court of the State of North Carolina to the Supreme Court of the United States, in order that the decision and judgment of the Supreme Court of the State of North Carolina may be reviewed on appeal and reversed, and also prays that the Clerk of the Supreme [fols. 67-68] Court of the State of North Carolina make and transmit to the Supreme Court of the United States, under his hand and the seal of the Supreme Court of the State of North Carolina, a true copy of the material parts of the record herein, which shall be designated by praecipe or stipulation of the parties or their counsel herein, as provided by law and in conformity with the Rules of the Supreme Court of the United States.

Dated, April 26, 1940.

Best & Company, Inc., Petitioner and Proposed Appellant, by Strauss, Reich & Boyer, Manly, Hendren & Womble, Attorneys.

[fol. 69] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

ASSIGNMENT OF ERRORS

Best & Company, Inc., plaintiff in the above entitled cause and applicant for the allowance of an appeal to the Supreme Court of the United States, assigns the following errors in the record of proceedings and final judgment of the Supreme Court of the State of North Carolina herein:

The Supreme Court of the State of North Carolina erred:

1. In holding that the provisions of Section 121(e) of Chapter 127 of the State of North Carolina Public Laws of

1937, C. S. 7880 (51) (e), are not repugnant to Section 8 of Article I of the Constitution of the United States.

2. In refusing to hold that the provisions of said statute of the State of North Carolina are repugnant to Section 8 of Article I of the Constitution of the United States in that:

(a) The said statute operates to place a tax or burden on interstate commerce which amounts to an unlawful regulation thereof, and to discriminate against such commerce in favor of intrastate commerce in the State of North Carolina.

(b) The tax imposed by the said statute and exacted from the appellant is a tax or burden on interstate commerce which amounts to an unlawful regulation thereof, and, as applied to the appellant, is a fixed-sum license or privilege tax on the business of soliciting orders for the purchase of goods to be shipped in interstate commerce, and constitutes a discrimination against such commerce and an unlawful obstruction of one of the essential and ordinary means and instrumentalities by which such commerce is legitimately carried on.

(c) If the tax imposed by said statute and exacted from the appellant is a use tax, as adjudged in said final judgment, it nevertheless constitutes a tax or burden on interstate commerce which amounts to an unlawful regulation thereof, and, as applied to the appellant, constitutes a discrimination against such commerce and an unlawful obstruction of one of the essential and ordinary means and instrumentalities by which such commerce is legitimately carried on.

3. In holding that the provisions of the said statute of the State of North Carolina do not deny to the appellant the equal protection of the laws and are therefore not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

4. In refusing to hold that the provisions of the said statute of the State of North Carolina deny to the appellant the equal protection of the laws and are therefore repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States in that:

(a) The said statute creates a whimsical, arbitrary, and capricious classification which has no reasonable or just basis therefor, and that its purpose, object and effect are to discriminate against the appellant and others who are not regular retail merchants in the State of North Carolina and in favor of local or regular retail merchants of said State who are not subject to the tax imposed by the said statute.

(b) The said statute imposes a tax or burden on the business transacted, sales made, and property situated without and not subject to the jurisdiction of the State of North Carolina, and that its purpose, object and effect are to discriminate against the appellant and others who are not regular retail merchants in the State of North Carolina and in favor of local or regular retail merchants of said State who are not subject to the tax imposed by the said statute.

5. In holding that the provisions of said statute of the [fols. 71-72] State of North Carolina do not deprive the appellant of property without due process of law and are therefore not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

6. In refusing to hold that the provisions of the said statute of the State of North Carolina deprive the appellant of property without due process of law and are therefore repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the tax imposed by the said statute and exacted from the appellant was a tax or burden on the business transacted and sales made by the appellant and property of the appellant situated without and not subject to the jurisdiction of the State of North Carolina.

7. In reversing, and in refusing to affirm, the judgment rendered by the Superior Court of Wake County, and in rendering final judgment in favor of the appellee and against the appellant.

For the errors hereinabove assigned the appellant prays that the said judgment of the Supreme Court of the State of North Carolina, dated June 16, 1939, in the above entitled

cause, be reversed and that judgment be entered in favor of the appellant.

Dated, April 26th, 1940.

Best & Company, Inc., by Strauss, Reich & Boyer,
Manly, Hendren & Womble, Attorneys.

[fol. 73] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

CERTIFICATE OF CHIEF JUSTICE

I, Walter P. Stacy, Chief Justice of the Supreme Court of the State of North Carolina, certify:

1. That a final judgment in the above entitled suit in the Supreme Court of the State of North Carolina, the highest court of the State of North Carolina in which a decision in the suit could be had, was made and entered in said Supreme Court of the State of North Carolina on June 16, 1939; that a petition to rehear and to correct certain errors contained therein as to the federal questions raised by Best & Company, Inc., was duly filed by said Best & Company, Inc., in the Supreme Court of the State of North Carolina and allowed on September 30, 1939; that a decision of said Supreme Court of the State of North Carolina disposing of the petition to rehear was filed therein on February 2, 1940, on which date the judgment in the above entitled cause became final for purposes of appeal to and review by the Supreme Court of the United States.

2. That in said suit there is drawn in question the validity of a statute of the State of North Carolina, to-wit: Section 121 (e) of Chapter 127 of the State of North Carolina Public Laws of 1937, C. S. 7880 (51) (e), on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

3. That said Best & Company, Inc., duly and properly [fols. 74-75] raised the following substantial federal questions which were considered and passed upon by the Supreme Court of the State of North Carolina, and are available for review by the Supreme Court of the United States upon appeal, to-wit:

(A) That said statute is repugnant to and infringes the commerce clause (Section 8 of Article I) of the Constitution of the United States.

(B) That said statute is repugnant to and infringes the equal protection and due process clauses (Section 1) of the Fourteenth Amendment to the Constitution of the United States.

Dated, Raleigh, North Carolina, April 29, 1940.

W. P. Stacy, Chief Justice of the Supreme Court of the State of North Carolina.

[fol. 76] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

ORDER ALLOWING APPEAL

The petition of Best & Company, Inc., for the allowance of an appeal in the above entitled cause to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of North Carolina, having been duly presented herein, accompanied by an assignment of errors and statement as to jurisdiction, together with prayer for reversal, and the record in this cause having been considered;

And it appearing from said petition, said other papers and the record in said cause that the appeal should be allowed; it is

Ordered that an appeal in the above entitled cause be and is hereby allowed to the Supreme Court of the United States from the judgment of the Supreme Court of the State of North Carolina entered June 16, 1939 as prayed in said petition; and it is further

Ordered that the Clerk of the Supreme Court of the State of North Carolina shall within 40 days from the date hereof make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein, which shall be designated by praecipe or stipulation of the parties or their counsel herein, pursuant to law and in conformity with the rules of the Supreme Court of the United States; and it is further

Ordered that Best & Company, Inc. shall give a good [fols. 77-78] and sufficient bond in the sum of Five Hundred Dollars (\$500) that it shall prosecute said appeal to effect, and, if it fail to make its plea good, shall answer all damages and costs.

Dated, Raleigh, North Carolina, April 29, 1940.

W. P. Stacy, Chief Justice of the Supreme Court of the State of North Carolina.

[fols. 79-85] Bond on appeal for \$500.00 approved and filed April 29, 1940 omitted in printing.

[fols. 86-87] Citation in usual form showing service on Harry McMullan et al., omitted in printing.

[fol. 88] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

PRAECIPE INDICATING PORTIONS OF RECORD TO BE INCORPORATED INTO TRANSCRIPT

To the Clerk of the Supreme Court of the State of North Carolina, Raleigh, North Carolina:

You are hereby requested, within the time specified in an order dated April 29, 1940, allowing an appeal herein, to make and transmit to the Supreme Court of the United States, under your hand and the seal of the Supreme Court of the State of North Carolina, a true copy of the following material parts of the record herein, which shall compose the transcript of record herein, to wit:

1. The entire record in the Supreme Court of the State of North Carolina.
2. Opinion of the Supreme Court of the State of North Carolina, dated June 16, 1939.
3. Judgment entered June 16, 1939 in the Supreme Court of the State of North Carolina.
4. Petition to rehear and allowance thereof.

5. The two opinions on rehearing, dated February 2, 1940.
6. License issued to Best & Company, Inc., by Commissioner of Revenue for the State of North Carolina.
7. Petition for appeal.
8. Assignment of errors.
9. Jurisdictional statement.
10. Certificate of Chief Justice of Supreme Court of the State of North Carolina.
11. Order allowing appeal.
- [fols. 89-91] 12. Bond, approval thereof, and acknowledgment of service.
13. Citation with acknowledgment of service.
14. Praecipe with acknowledgment of service and stipulation as to portions of record to be included in transcript.
15. Proof of service of petition for and order allowing the appeal, together with copy of assignments of error and of the jurisdictional statement, and statement directing appellee's attention to the provisions of paragraph 3 of Rule XII of the General Rules of the Supreme Court of the United States.
16. Certificate of filing appeal papers with Clerk of Supreme Court of the State of North Carolina.

Dated April 29, 1940.

Strauss, Reich & Boyer, Manly, Hendren & Womble,
Attorneys for Best & Company, Inc., appellant in
the Supreme Court of the United States.

Service of a copy of the above praecipe acknowledged this
29th day of April, 1940.

Harry McMullan, Attorney General of the State of
North Carolina. T. W. Bruton, Assistant Attorney
General, Attorneys for A. J. Maxwell, Commissioner
of Revenue for the State of North Carolina, appellee
in the Supreme Court of the United States.

[fols. 92-93] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

CERTIFICATE OF FILING APPEAL PAPERS

I, Edward Murray, Clerk of the Supreme Court of the
State of North Carolina, do hereby certify that the follow-

ing papers were filed with me as such Clerk on April 29, 1940 in the above entitled cause, to wit:

1. Petition for appeal to the Supreme Court of the United States.
2. Assignment of errors.
3. Jurisdictional statement.
4. Certificate of the Chief Justice of the Supreme Court of the State of North Carolina.
5. Order allowing appeal.
6. Bond.
7. Praecipe.

Dated, Raleigh, North Carolina, April 29, 1940.

Edward Murray, Clerk of the Supreme Court of the State of North Carolina.

[fol. 94] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

DOCKET ENTRIES

Appeal docketed 28 March, 1939.

Case argued 12 April, 1939.

Opinion filed 16 June, 1939.

Petition to rehear filed 25 July, 1939.

Petition to rehear allowed 30 September, 1939.

Case re-argued 16 December, 1939.

Opinion on petition to rehear filed 2 February, 1940.

Final Judgment entered 2 February, 1940.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 95] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed April 30, 1940.

Comes now the appellant and states that the points upon which it intends to rely in this Court in this case are as follows:

It adopts its assignment of errors as its points to be relied upon herein, which said assignment of errors it repeats and incorporates as a whole herein.

Appellant further states that it designates, as the parts of the record which it thinks necessary for the consideration of the said points, all the papers designated in its praecipe, which together constitute the whole of the record as filed.

Dated, April 29, 1940.

Nathaniel D. Reich, Lorenz Reich, Jr., M. James Spitzer, W. P. Sandridge, Counsel for Appellant.

[fols. 96-97] Service of a copy of the above statement acknowledged this 29 day of April, 1940.

Harry McMullan, Attorney General of the State of North Carolina; T. W. Bruton, Assistant Attorney General, Attorneys for A. J. Maxwell, Commissioner of Revenue for the State of North Carolina, appellee in the Supreme Court of the United States.

[fol. 98] [File endorsement omitted.]

Endorsed on Cover: File No. 44,368. North Carolina, Supreme Court, Term No. 61. Best & Company, Inc., Appellant, vs. A. J. Maxwell, Commissioner of Revenue for the State of North Carolina. Filed April 30, 1940. Term No. 61 O. T. 1940.

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FILE COPY

Office - Supreme Court, U. S.

FILED

APR 30 1940

CHARLES CLARE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. [REDACTED] 61

BEST & COMPANY, INC.,

Appellant,

vs.

A. J. MAXWELL, COMMISSIONER OF REVENUE OF THE STATE
OF NORTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH
CAROLINA.

STATEMENT AS TO JURISDICTION.

LORENZ REICH, JR.,
Counsel for Appellant.

STRAUSS, REICH & BOYER,
MANLY, HENDERSON & WOMBLE,
Of Counsel.

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IN THE
SUPREME COURT OF NORTH CAROLINA
FALL TERM, 1939.

No. 451

Wake Seventh District.

BEST & COMPANY, INC.,

vs.

A. J. MAXWELL, COMMISSIONER OF REVENUE.

JURISDICTIONAL STATEMENT

Best & Company, Inc., plaintiff in the above entitled cause, and applicant for the allowance of an appeal to the Supreme Court of the United States from the Supreme Court of the State of North Carolina, contends and respectfully represents that the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment herein is as follows:

I.

Statutory Provision Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction is section 237 (a) of the Judicial Code, as amended, 28 U. S. C., § 344(a).

The case is one in which, under the legislation in force when the Act of Congress of January 31, 1928, was passed, a review could be had in the Supreme Court of the United States on writ of error, for which remedy an appeal has been substituted.

Act of January 31, 1928, as amended by the Act of April 26, 1928, 45 Stat. 54, 466, 28 U. S. C., §§ 861a, 861b.

II.

Statute of the State the Validity of Which is Involved

The statute of the State of North Carolina, the validity of which is involved, is Section 121(e) of Chapter 127 of the State of North Carolina Public Laws of 1937, p. 208; C. S. 7880 (51) (e), which *verbatim* reads as follows:

"Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of displaying such samples, goods, wares or merchandise, and shall pay an annual privilege tax of two hundred fifty dollars (\$250.00), which license shall entitle such person, firm, or corporation to display such samples, goods, wares, or merchandise in any county in this State."

The pertinent provisions of said Chapter 127 are appended hereto (Exhibit A).

III.

Date of Judgment and Date of Application for Appeal.

The judgment sought to be reviewed is a final judgment of the Supreme Court of the State of North Carolina (216

N. C. 114, 3 S. E. (2d) 292), the highest court of that State in which a decision in the suit could be had. The date of said judgment was June 16, 1939. A petition to rehear and to correct certain errors therein was duly filed by appellant and allowed by the said Supreme Court on September 30, 1939. * The said Supreme Court disposed of the petition to rehear by decision. (— N. C. —, 6 S. E. (2d) 893) filed therein on February 2, 1940, on which date the judgment in the above-entitled cause became final for the purpose of appeal to and review by the Supreme Court of the United States.

Citizens Bank v. Opperman, 249 U. S. 448;

Chicago G. W. R. R. Co. v. Basham, 249 U. S. 164.

The date upon which the application for appeal is presented is April 29, 1940.

IV.

Nature of the Case and of the Rulings of the Court Below.

The nature of the case and of the rulings of the Supreme Court of the State of North Carolina, which are deemed to bring the case within the jurisdictional provisions relied on, are as follows:

This suit was instituted by appellant in the Superior Court of Wake County, North Carolina, to recover the amount of tax collected by the appellee, as Commissioner of Revenue for the State of North Carolina, from the appellant in purported compliance with the said statute and paid by appellant involuntarily and under protest on the ground that the said statute is repugnant to the Constitution of the United States.

The complaint and the amended complaint allege that the said statute is unconstitutional, null, and void in that it contravenes, *inter alia*, Section 8 of Article I of the Consti-

4

tution of the United States and Section 1 of the Fourteenth Amendment.

Issue was joined by the answer which denies that the said statute is invalid and unconstitutional, concedes that the amount sought to be recovered was demanded and collected from the appellant as a license tax levied under the said statute but sets up as a separate defense that the statute levied a tax upon the appellant for the use of space in a hotel in the City of Winston-Salem for the display of appellant's goods, wares and merchandise, and admits many of the material factual allegations of the complaint.

The facts, all of which were either stipulated or admitted by the answer, are as follows:

The appellant, a New York corporation, is engaged in the retail apparel specialty store business in New York City, and is not a "regular retail merchant in the State of North Carolina" within the meaning of the statute, has no store or other place of business, officer, or agent therein, and is not domicicated in North Carolina.

On February 9, 1938 the appellant rented a room in a hotel in Winston-Salem, North Carolina, in which for a period of a few days it displayed some samples of its merchandise to local residents who were invited by notices previously mailed from appellant's office in New York. The articles on display were merely samples, which were exhibited to obtain orders for the retail sale of similar goods for future shipment in interstate commerce. No merchandise was sold or delivered, and none was offered or available for that purpose.

The orders were taken subject to acceptance or rejection at appellant's office in New York. All orders were forwarded to appellant in New York, and those which were accepted were filled by shipment of the merchandise from New York direct to the customers by mail or other regular channels of interstate commerce. No merchandise was

sent to any employee, agent, or representative of appellant in North Carolina.

No payment or deposit on account of the purchase price was made or received at the time of the display. Invoices were sent from New York direct to the customers, who remitted payments to appellant's New York office.

There is no issue as to the character of the merchandise, which was a legitimate subject of interstate commerce; and the tax does not purport to be exacted in the exercise of the police power of the State (compare *Brennan v. Titusville*, 153 U. S. 289, 298-299).

The Federal questions raised by the pleadings were presented by appellant on the trial of the action in the Superior Court of Wake County, the court of first instance, which rendered judgment in favor of the appellant for the full amount sought to be recovered. No opinion was written.

On appeal to the Supreme Court of the State of North Carolina, the highest court of the State, appellant argued orally and in its brief that the statute was repugnant to the Constitution of the United States on the grounds set forth in its amended complaint. Said Supreme Court held that the statute did not violate the Constitution. It reversed the judgment of the said Superior Court and entered judgment against the appellant on June 16, 1939. An opinion was rendered (216 N. C. 114), with the chief justice dissenting and one associate justice not participating; a copy of the said opinion is appended hereto (Exhibit B).

In its opinion the said Supreme Court made the following rulings:

that the State tax levied by the statute upon the display of samples and merchandise was not invalid as violative of the Commerce Clause of the Constitution of the United States (p. 115);

that "the Federal Constitution nowhere *expressly* prohibits the taxation of interstate commerce by a state, or even its direct regulation", but "merely gives to Congress the power to 'regulate' commerce among the states" (p. 115);

that "the express retention by the states of powers not delegated to the Federal Government argue strongly against the existence of any implied power of the Federal Government (growing out of the Commerce Clause) to strike down a state tax on commercial activity carried on within the borders of the taxing state" (p. 115);

that the said statute does not "discriminate against non-residents" (p. 116);

that "the taxed act is a local one, involving the use of purely local property" and "is a use tax, levied in the State of North Carolina upon profitable and commercial activity * * *" (p. 116);

The tax in no way hampers the movement of the samples, goods, etc., or of the merchandise sold, in interstate commerce. The tax in no way regulates the interstate or out-of-state activity of the person seeking to sell by display in North Carolina, * * *" (p. 117);

that "although such displaying by sample may ultimately result in orders which will flow into interstate commerce, such commercial activity cannot cloak itself in immunity from taxation merely by calling the magic words 'Interstate Commerce'. The use of North Carolina real estate for the purpose of displaying samples is commercially intended to result in interstate commerce, but this preliminary activity is merely a separate and distinct effort of the seller seeking * * * to stimulate the desire for the seller's goods" (p. 117);

that "the display use of hotel rooms and temporarily rented property here taxed is * * * a preliminary and incidental activity which, at the election of the

seller, may or may not transpire prior to the beginning of the flow of events which constitute the movement of goods in interstate commerce * * * and is essentially intrastate and local in nature" (p. 117) * * * which "is not freed from state taxation" (p. 118).

The opinion of said Supreme Court incorrectly contained the statement that the statute was not challenged as violative of any provision of either the Federal or State constitutions other than the Commerce Clause (p. 115), although appellant had raised the issue that it violated Section 1 of the Fourteenth Amendment.

The appellant filed a petition to rehear, which was allowed by said Supreme Court on September 30, 1939, in which the appellant prayed for a rehearing of the appeal on the merits and for correction of the statement contained in the opinion.

On February 2, 1940 the said Supreme Court decided the said application to rehear as follows:

It granted the petition insofar as it sought to correct the statement contained in its original opinion that the statute had been challenged only upon the ground that it violated the Commerce Clause of the Federal Constitution, and held that appellant had additionally challenged the enactment as in contravention of other clauses of the Constitution.

By an evenly divided bench, one Justice not participating, it dismissed that portion of the said application which sought a rehearing of the appeal upon the merits.

Copies of both said opinions are appended hereto (Exhibit C).

The judgment of said Supreme Court thereby and thereupon became final for purposes of review by and appeal to the Supreme Court of the United States, and there was therein drawn in question the validity of said statute on the

ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

V.

Cases Believed to Sustain the Jurisdiction.

The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States:

- Robbins v. Shelby Taxing District*, 120 U. S. 489;
- Asher v. Texas*, 128 U. S. 129;
- Stoutenburgh v. Hennick*, 129 U. S. 141;
- Brennan v. Titusville*, 153 U. S. 289;
- Stockard v. Morgan*, 185 U. S. 27;
- Caldwell v. North Carolina*, 187 U. S. 622;
- Rearick v. Pennsylvania*, 203 U. S. 507;
- Dozier v. Alabama*, 218 U. S. 124;
- Crenshaw v. Arkansas*, 227 U. S. 389;
- Rogers v. Arkansas*, 227 U. S. 401;
- Davis v. Virginia*, 236 U. S. 697;
- Real Silk Mills v. Portland*, 268 U. S. 325;
- Welton v. State of Missouri*, 91 U. S. 275;
- Corson v. Maryland*, 120 U. S. 502;
- Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147;
- Sonneborn Bros. v. Cureton*, 262 U. S. 506, 515;
- Alpha Cement Co. v. Massachusetts*, 268 U. S. 203, 217-218;
- Norfolk & West. Ry. Co. v. Sims*, 191 U. S. 441.

The *Robbins* case and the long line of decisions following it has been cited with approval in the following recent cases:

- McGoldrick v. Berwind-White Coal Mining Co.*, 308 U. S. — (decided Jan. 29, 1940); 60 S. Ct. 388;
- Southern Pac. Co. v. Gallagher*, 306 U. S. 167, 174;
- Gwin, etc., Inc. v. Henneford*, 305 U. S. 434, 437, 441;

South Carolina Hwy. Dept. v. Barnwell Bros., 303 U. S. 177, 185, 186;

Cooney v. Mountain States Tel. Co., 294 U. S. 384, 392;

Minnesota v. Blasius, 290 U. S. 1, 9;

Helson and Randolph v. Kentucky, 279 U. S. 245, 250;

Texas Transp. Co. v. New Orleans, 264 U. S. 150—also dissent at p. 157.

VI.

The Federal Questions Involved are Substantial.

The following is a statement of the grounds upon which it is contended that the Federal questions involved are substantial.

The issue herein is whether or not a State may, without exceeding the limitations and restrictions of the Constitution of the United States, require appellant, who is a merchant of another State, to obtain a license and to pay a so-called annual privilege tax for the privilege of temporarily displaying samples or merchandise within the State for the sole purpose of securing orders for the sale of such merchandise through the channels of interstate commerce.

The appellant challenges the validity and constitutionality of a statute of the State of North Carolina purporting to require such license from and to levy such tax against appellant, on the grounds that the statute imposes an unconstitutional burden on commerce between the States in contravention of Article I, Section 8 of the said Constitution, and deprives appellant of its property without due process of law and denies to it the equal protection of the laws in contravention of Section 1 of the Fourteenth Amendment.

The North Carolina tax is directly aimed at and discriminates against interstate commerce. Equality is not its theme.

The tax does not apply to a regularly established North Carolina retail merchant, and is therefore of necessity restricted to merchants engaging in interstate activity and maintaining no regular place of business in North Carolina.

In the language of Mr. Justice Stone in *McGoldrick v. Berwind-White Coal Mining Co.*, 308 U. S. —, 60 S. Ct. 388, at p. 393:

“Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it * * *.”

The Supreme Court of the State of North Carolina in its opinion below cites no direct authority for sustaining the validity of the instant tax, but relies, as it states, upon the adoption by the Supreme Court of the United States of “a new approach to the problem of State taxation as it relates to interstate commerce” (216 N. C. 114, 120).

We frankly recognize that there has been a broadening of the authority of the States to impose upon interstate commerce a fair share of State tax burden, but to be permissible equality must be the theme of the taxation. In no instance has a tax been sustained where, as here, discrimination is its essence. This very type of State taxation has received the condemnation of the United States Supreme Court not only in *Robbins v. Shelby County Taxing District, supra*, and a long line of decisions following and citing it, but also in its most recent pronouncements. (See *V, supra*.)

In *McGoldrick v. Berwind-White Coal Mining Co., supra*; which was decided subsequent to the decision of the court below herein, the United States Supreme Court held as follows:

"It is also urged that the conclusion which we reach is inconsistent with the long line of decisions of this Court following *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, which have held invalid license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing State. In some instances the tax appeared to be aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing intrastate sales. See *Robbins v. Shelby County Taxing District*, *supra*, 120 U. S. page 498, 7 S. Ct. page 596, 30 L. Ed. 694; *Caldwell v. North Carolina*, 187 U. S. 622, 632, 23 S. Ct. 229, 233, 47 L. Ed. 336, * * *. It is enough for the present purposes that the rule of *Robbins v. Shelby County Taxing District*, *supra*, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate. Compare *Robbins v. Shelby County Taxing District*, *supra*, with *Ficklen v. Shelby County Taxing District*, 145 U. S. 1, 12 S. Ct. 810, 36 L. Ed. 601, see *Howe Machine Co. v. Gage*, *supra*; *Wagner v. Covington*, *supra*; * * *."

In the case at bar the statute falls precisely within the category "of such fixed-sum license tax" statutes.

It is noteworthy that the decision of the North Carolina Supreme Court herein did not meet with the approval of a majority of the members of that court. One of the seven members of the court did not participate, and on rehearing three of the remaining six Justices (including two who had previously concurred in the original prevailing opinion) sharply protested against the "forced" construction of the statute which "admits only of the interpretation that it is a tax on the privilege of taking orders for goods to be shipped in interstate commerce. The authorities are one in holding that such legislation is unconstitutional."

It is also noteworthy that the original prevailing opinion of that court sought to save the tax from repugnancy to the Federal Constitution on the theory that the tax imposed under the statute was a "use tax" affecting purely local activity, despite the fact that the statute itself specifically denominates it a "license tax", and in its practical operation it affects only the transaction of interstate commerce. On rehearing three of the six participating Judges condemned such theory in the following language:

"Nor can the construction heretofore given to the statute save it from constitutional offense. If the tax imposed be a 'use tax', it is discriminatory."

The decision of the North Carolina Supreme Court herein is squarely in conflict with the decisions of the Supreme Courts of the States of South Carolina and Louisiana (the highest Courts of each of such States), rendered subsequent to the North Carolina decision, in suits to which appellant or its representative was a party, in which there were challenged the validity and constitutionality of the statute of each of such States, respectively, in all material respects identical with the North Carolina statute. The facts in all three cases are alike. The South Carolina and Louisiana Supreme Courts each held the corresponding statute of its State to be invalid on the ground that it was repugnant to the Commerce Clause of the Constitution of the United States, and both Courts expressly rejected the conclusion of the court below herein.

State v. Yetter, 192 S. C. 1, 5 S. E. (2d) 291;

State of Louisiana v. Best & Co., — La. — (decided November 27, 1939), rearg. denied, — La. — (decided April 2, 1940).

Although no appeals are pending from the decisions of the said Supreme Courts and they are therefore not companion

cases, copies of the opinions of the South Carolina and Louisiana courts are appended hereto (Exhibits D and E).

The nominal amount of tax sought to be recovered in the suit herein is manifestly no measure whatsoever of its gravity and moment. This suit was instituted as a test case. Subsequent to its inception, appellant has been required to pay involuntarily and under protest substantial amounts of tax. The statute purports to levy not merely a State annual privilege tax of \$250 under sub-section (e) of Section 121 thereof, but also under sub-section (h) thereof counties, cities or towns may levy a license tax on the same business in an amount not in excess of the annual license levied by the State; and many of the counties, cities and towns in the State of North Carolina have taken advantage of such legislative permission and levied taxes at the same rate. During the month of September, 1939, appellant was involuntarily obliged to pay approximately \$2,500 to the counties and municipalities of the State of North Carolina in local privilege license taxes levied under or pursuant to the authorization contained in said subsection (h), in order that appellant might conduct five exhibits in the State, each lasting two or three days.

Measured in terms of its capacity to obstruct and to foster discrimination against interstate commerce the issues presented are of most serious and far reaching consequence, both as affecting private interests and the public welfare.

If the instant statute of the State of North Carolina is valid and does not infringe upon the constitutional restriction, each of the other States may enact similar legislation. Local merchants and others motivated by personal and purely selfish interests would seize with alacrity upon the opportunity to importune the several State legislatures and

local legislative bodies to enact similar allegedly "protective" statutes and ordinances.

The scope of the legislation might well be broadened. If a non-resident merchant may be taxed and required to obtain a license for the display of samples and merchandise in hotel rooms and rented houses for the purposes of securing orders for the purchase of goods to be shipped interstate, then by the same token he may be subjected to exactions and restrictions for exhibiting his samples and merchandise in other types of buildings or in going from door to door. Such taxation may also be extended to representatives of wholesalers and manufacturers displaying samples for the purpose of securing orders for the sale of their merchandise by interstate shipment. By degrees interstate barriers would be set up and interstate commerce throttled. In 1887, when *Robbins v. Shelby County Taxing District*, *supra*, was decided, 16 States required the payment of license taxes by drummers of various kinds. Mr. Justice Stone pointed out in a footnote to the decision in *McGoldrick v. Berwind-White Coal Mining Co.*, *supra*, that almost 800 municipal ordinances directed at drummers had been adopted for the purpose of embarrassing competition with local merchants. He added that the court was cognizant of this trend and had declared invalid 19 such taxes following the *Robbins* decision. In the language of Mr. Justice Stone:

"Lying back of these decisions is the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state."

The vital importance of maintaining the freedom of commerce across State lines was succinctly stated by the late

Mr. Justice Holmes in his "Collected Legal Papers", at pp. 295, 296, as follows:

"I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end."

A substantial Federal question is involved herein requiring review by the Supreme Court of the United States.

Dated, April 26, 1940.

Respectfully submitted,

STRAUSS, REICH & BOYER,
MANLY, HENDREN & WOMBLE,
Attorneys for Appellant.

EXHIBIT A.

The pertinent provisions of Chapter 127 of the State of North Carolina Public Laws of 1937 are as follows:

ARTICLE II.**SCHEDULE B.****LICENSE TAXES.**

§ 100. Taxes under this article.—Taxes in this article or schedule shall be imposed as State license tax for the privilege of carrying on the business, exercising the privilege, or doing the act named, and nothing in this article shall be construed to relieve any person, firm, or corporation from the payment of the tax prescribed in this article or schedule.

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(b) Every State license issued under this article or schedule shall be for twelve months, shall expire on the thirty-first day of May of each year, and shall be for the full amount of tax prescribed: Provided, that where the tax is levied on an annual basis and the licensee begins such business or exercises such privilege after the first day of January and prior to the thirty-first day of May of each year, then such licensee shall be required to pay one-half of the tax prescribed other than the tax prescribed to be computed and levied upon a gross receipts and/or percentage basis for the conducting of such business or the exercising of such privilege to and including the thirty-first day of May, next following. Every county, city and town license issued under this article or schedule shall be for twelve months, and shall expire on the thirty-first day of May or thirtieth day of June of each year as the governing body of such county, city or town may determine: Provided, that where the licensee begins such business or exercises such privilege after the expiration of seven months of the current license year of such municipality, then such licensee shall be required to pay one-half of the tax prescribed other

than the tax prescribed to be computed upon a gross receipts and/or percentage basis.

(c) The State license thus obtained shall be and constitute a personal privilege to conduct the business named in the State license, shall not be transferable to any other person, firm, or corporation, and shall be construed to limit the person, firm, or corporation named in the license to conducting the business and exercising the privilege named in the State license to the county and/or city and location specified in the State license, unless otherwise provided in this article or schedule:

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(e) All State taxes imposed by this article shall be paid to the Commissioner of Revenue, or to one of his deputies; shall be due and payable on or before the first day of June of each year, and after such date shall be deemed delinquent, and subject to all the remedies available and the penalties imposed for the payment of delinquent State license and privilege taxes: Provided, that if a person, firm, or corporation begins any business or the exercise of any privilege requiring a license under this article or schedule after the thirty-first day of May and prior to the thirty-first day of the following May of any year, then such person, firm, or corporation shall apply for and obtain a State license for conducting such business or exercising any such privilege in advance, and before the beginning of such business or the exercise of such privilege; and a failure to so apply and to obtain such State license shall be and constitute a delinquent payment of the State license tax due, and such person, firm, or corporation shall be subject to the remedies available and penalties imposed for the payment of such delinquent taxes.

(There follows an enumeration of the various businesses, privileges, etc. subject to the imposition of the license tax above referred to.)

§ 121. Peddlers.—(a) Any person, firm, or corporation who or which shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same,

or actually sells or barter the same, shall be deemed a peddler, except such person, firm, or corporation who or which is a wholesale dealer, with an established warehouse in this State and selling only to merchants for resale, and shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business, and shall pay for such license the following tax:

(c) Any person, firm, or corporation who or which sells or offers to sell from a cart, wagon, truck, automobile, or other vehicle operated over and upon the streets and/or highways within this State any fresh fruits and/or vegetables shall be deemed a peddler within the meaning of this section and shall pay the annual license tax levied in subsection (a) of this Act with reference to the character of the vehicle employed.

(d) Every itinerant salesman or merchant who shall expose for sale, either on the street or in a building occupied, in whole or in part, for that purpose, any goods, wares, or merchandise, not being a regular merchant in such county, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of transacting such business, and shall pay for such license a tax of one hundred dollars (\$100.00) in each county in which he shall conduct or carry on such business.

(e) Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina; who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in advance and procure a State license from the Commis-

* The tax imposed upon applicant was exacted in purported compliance with section 121 (e).

sioner of Revenue for the privilege of displaying such samples, goods, wares or merchandise, and shall pay an annual privilege tax of two hundred fifty dollars (\$250.00), which license shall entitle such person, firm, or corporation to display such samples, goods, wares, or merchandise in any county in this State.

(h) Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of the annual license levied by the State.

No county, city, or town shall levy any license tax under this section upon the persons so exempted in this section, nor upon drummers selling by wholesale:

§ 181. Unlawful to operate without license.—When a license tax is required by law, and whenever the General Assembly shall levy a license tax on any business, trade, employment, or profession, or for doing any act, it shall be unlawful for any person, firm, or corporation without a license to engage in such business, trade, employment, profession, or do the act; and when such tax is imposed it shall be lawful to grant a license for the business, trade, employment, or for doing the act; and no person, firm, or corporation shall be allowed the privilege of exercising any business, trade, employment, profession, or the doing of any act taxed in this schedule throughout the State under one license, except under a state-wide license.

§ 182. Manner of obtaining license from the Commissioner of Revenue.—(a) Every person, firm, or corporation desiring to obtain a State license for the privilege of engaging in any business, trade, employment, profession, or of the doing of any act for which a State license is required shall, unless otherwise provided by law, make application therefor in writing to the Commissioner of Revenue, in which shall be stated the county, city, or town and the definite place therein where the business, trade, employment, or profession is to be exercised; the name and resident

address of the applicant, whether the applicant is an individual, firm, or corporation; the nature of the business, trade, employment, or profession; number of years applicant has prosecuted such business, trade, employment, or profession in this State, and such other information as may be required by the Commissioner of Revenue. The application shall be accompanied by the license tax prescribed in this article.

(b) Upon receipt of the application for a State license with the tax prescribed by this article, the Commissioner of Revenue, if satisfied of its correctness, shall issue a State license to the applicant to engage in the business, trade, employment, or profession in the name of and at the place set out in the application. No license issued by the Commissioner of Revenue shall be valid or have any legal effect unless and until the tax prescribed by law has been paid, and the fact of such shall appear on the face of the license.

§ 187. Engaging in business without a license.—(a) All State license taxes under this article or schedule, unless otherwise provided for, shall be due and payable annually on or before the first day of June of each year, or at the date of engaging in such business, trade, employment, and/or profession, or doing the act.

(b) If any person, firm, or corporation shall continue the business, trade, employment, or profession, or to do the act, after the expiration of a license previously issued, without obtaining a new license, he or it shall be guilty of a misdemeanor, and upon conviction shall be fined and/or imprisoned in the discretion of the court, but the fine shall not be less than twenty per cent (20%) of the tax in addition to the tax and the costs; and if such failure to apply for and obtain a new license be continued, such person, firm or corporation shall pay additional tax of five per centum (5%) of the amount of the State license tax which was due and payable on the first day of June of the current year, in addition to the State license tax imposed by this article, for each and every thirty days that such State license tax re-

mains unpaid from the date that same was due and payable, and such additional tax shall be assessed by the Commissioner of Revenue and paid with the State license tax, and shall become a part of the State license tax. The penalties for delayed payment hereinbefore provided shall not impair the obligation to procure a license in advance or modify any of the pains and penalties for failure to do so.

The provisions of this section shall apply to taxes levied by the counties of the State under authority of this Act in the same manner and to the same extent as they apply to taxes levied by the State.

(c) If any person, firm, or corporation shall commence to exercise any privilege or to promote any business, trade, employment, or profession, or to do any act requiring a State license under this article without such State license, he or it shall be guilty of a misdemeanor, and shall be fined and/or imprisoned in the discretion of the court; and if such failure, neglect, or refusal to apply for and obtain such State license be continued, such person, firm, or corporation shall pay an additional tax of five per centum (5%) of the amount of such State license tax which was due and payable at the commencement of the business, trade, employment, or profession, or doing the act, in addition to the State license tax imposed by this article, for each and every thirty (30) days that such State license tax remains unpaid from the date that same was due and payable, and such additional tax shall be assessed by the Commissioner of Revenue and paid with the State license tax and shall become a part of the State license tax.

§ 189. Duties of Commissioner of Revenue. (a) Except where otherwise provided, the Commissioner of Revenue shall be the duly authorized agent of this State for the issuing of all State licenses and the collection of all license taxes under this article, and it shall be his duty . . . to ascertain whether all persons, firms, or corporations in the various counties of the State who are taxable under the provisions of this article have applied for the State license and paid the tax thereon levied.

(b) The Commissioner of Revenue shall continually keep in his possession a sufficient supply of blank State license certificates, with corresponding sheets and duplicates consecutively numbered; shall stamp across each State license certificate that is to be good and valid in each and every county of the State the words "State-wide license," and shall stamp or imprint on each and every license certificate the words "issued by the Commissioner of Revenue."

(c) Neither the Commissioner of Revenue nor any of his deputies shall issue any duplicate license unless expressly authorized to do so by a provision of this article or schedule, and unless the original license is lost or has become so mutilated as to be illegible, and in such cases the Commissioner of Revenue is authorized to issue a duplicate certificate for which the tax is paid, and shall stamp upon its face "duplicate".

§ 190. License to be procured before beginning business.—

(a) Every person, firm, or corporation engaging in any business, trade, and/or profession, or doing any act for which a State license is required and a tax is to be paid under the provisions of this article or schedule, shall, annually in advance, on or before the first day of June of each year, or before engaging in such business, trade, and/or profession, or doing the act, apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, trade, and/or profession, or doing such act, and shall pay the tax levied therefor.

(b) Licenses shall be kept posted where business is carried on. No person, firm, or corporation shall engage in any business, trade and/or profession, or do the act for which a State license is required in this article or schedule, without having such State license posted conspicuously at the place where such business, trade, and/or profession is carried on; and if the business, trade, and/or profession is such that license cannot be so posted, then the itinerant licensee shall have such license required by this article or schedule in his actual possession at the time of carrying on such business, trade, and/or profession, or doing the act named in this article or schedule, or a duplicate thereof.

(c) Any person, firm, or corporation failing, neglecting, or refusing to have the State license required under this article or schedule posted conspicuously at the place of business for which the license was obtained, or to have the same or a duplicate thereof in actual possession if an itinerant, shall pay an additional tax of twenty-five dollars (\$25.00) for each and every separate offense, and each day's failure, neglect, or refusal shall constitute a separate offense.

EXHIBIT B.

Judgment Sought to be Reviewed.

**IN THE SUPREME COURT OF NORTH CAROLINA,
SPRING TERM, 1939.**

No. 463.

BEST & COMPANY, INC.,

A. J. MAXWELL, Commissioner of Revenue.

Appeal by defendant from Frizzelle, J., January 16 Term, 1939, Wake Superior Court. *Reversed.*

This is a civil action to recover \$250.00 in taxes paid defendant, under protest, by virtue of Chapter 127, Sec. 121, subsec. e (Revenue Act, 1937), of the Public Laws of 1937. It is agreed by the parties that plaintiff is not a regular retail merchant in North Carolina and has no regular place of business in this State; but that plaintiff is a New York corporation having its principal office in New York City. It is likewise agreed that just prior to February 9, 1938, plaintiff rented for several days a display room in the Robert E. Lee Hotel, in Winston-Salem, and there displayed samples and secured retail orders for merchandise, later filled by shipment from the New York office, and that the tax here in dispute was levied upon this activity of plaintiff.

From a judgment for the plaintiff in the sum of \$250.00, with interest, defendant appealed to this Court. The only exception and assignment of error is to the signing of the judgment.

Manly, Hendren & Womble and W. P. Sandridge for plaintiff.

Atty.-General McMullan and Asst. Attys.-General Bruton Wettach, and Bailey & Lassiter, amicus curiae, for defendant.

CLARKSON, J.:

The only question raised by this appeal: Is the State tax upon the display of samples, goods, etc., (a) in a hotel room, or house rented or occupied temporarily, (b) for the purpose of securing orders for the retail sale of such goods, etc., (c) by a person, firm or corporation, not a regular retail merchant in the State, invalid as violative of the Commerce Clause of the Constitution of the United States, Art. 1, Sec. 8 (3)? We think not.

The Act is not challenged as violative of any other provision of either the State or Federal Constitutions. The single question presented for our determination: Does the facts in this case violate the Constitutional grant to Congress of the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes?" This clause, and the remainder of the Federal Constitution, is significantly lacking in any prohibition of the taxation of commerce carried on within the borders of any state, and the right of the State to tax such intra-state commerce is not questioned. Further, the Federal Constitution nowhere *expressly* prohibits the taxation of inter-state commerce by a State, or even its direct regulation. The Commerce Clause merely gives to Congress the power to "regulate" commerce among the States. It is well to remember that the Federal Government is one of granted power only; the Tenth Amendment to the Constitution (and North Carolina would not ratify the Constitution until the Bill of Rights had been adopted) declares, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states,

respectively, or to the people." The "Commerce Clause" has come to be written in capital letters rather by reason of more recent judicial interpretation of the clause than by the clear, expressed intent of the constitutional fathers. The express retention by the States of powers not delegated to the Federal Government argues strongly against the existence of any implied power of the Federal Government (growing out of the Commerce Clause) to strike down a state tax on commercial activity carried on within the borders of the taxing state. Unless the implied prohibition of taxes definitely burdening inter-state commerce (developed and given expression in *Robbins v. Taxing District*, 120 U. S. 489; *Real Silk Hosiery Mills Co. v. Portland*, 268 U. S. 325, and numerous interim cases) reaches to, and renders immune from state taxation, the commercial activity here taxed, the instant case represents a valid exercise of the state taxing power. The Supreme Court of the United States has long recognized the force of these considerations and has heretofore indicated that implied prohibitions growing out of the Commerce Clause must, necessarily, be reluctantly and rarely applied. "Whatever amounts to a more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of danger and meet it. This Court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effects upon it are clearly non-existent." *Stafford v. Wallace*, 258 U. S. 495 (521); *Board of Trade v. Olsen*, 262 U. S. 1 (37); see also *Walton v. State of Missouri*, 91 U. S. 275. Nor, by the same standard, can it be presumed that the Supreme Court of the United States will substitute its judgment as to the valid exercise of a state legislature's taxing power for that of the state legislature, unless the tax act "clearly" and "unduly" burdens the "freedom of interstate commerce." " * * * Property within the state, privileges granted by the state, and intra-state commerce done within the state are uniformly held proper subjects of state taxation." Powell. "Indirect Encroachments on Federal Authority by the Taxing Powers of the States, 5 Se-

lected Essays on Constitutional Law", at p. 391; also see pp. 418, 470.

It then becomes pertinent to determine whether it can be fairly said that the instant act, in this case, clearly constitutes a direct and undue burden upon interstate commerce. The measure is clear and concise; before it is applicable there must be the following requisites set forth in the law: (a) the act, i.e., the display of samples, goods, etc., (b) the place, i.e. in a hotel room or temporarily occupied house, (c) the mental element, or purpose, i.e., for the purpose of securing orders for retail sale of the goods, etc., and (4) the person, i.e., one not a regular merchant. In essence, the tax is one imposed upon anyone, not otherwise taxed as a retail merchant, who uses a North Carolina hotel room or temporarily occupied house, for commercial display purposes in the interest of retail sales. It is a use tax, levied in the State of North Carolina upon profitable and commercial activity which has otherwise escaped taxation and which, therefore, discriminates against no one but seeks to remove a discrimination previously existing against regular, taxed, retail merchants. Under this statute the act taxed must occur in North Carolina, and the room where the act transpires must be within the State. The taxed activity must be directed at the retail trade in North Carolina, seeking to reach personally the citizens and residents of this State. The measure does not in any way impinge upon the activities of the wholesale trade, nor does it discriminate against non-residents. All citizens and residents of North Carolina, and non-residents alike, (other than retail merchants who have already been taxed for their commercial activities) who engage in the taxable activity are liable for the tax. The taxed act is a local one, involving the use of purely local property. The tax in no way hampers the movement of the samples, goods, etc., or of the merchandise sold, in interstate commerce. The tax in no way regulates the inter-state or out-of-state activity of the person seeking to sell by display in North Carolina, nor does it in any way interfere with sales by sample by house-to-house canvassers. Finally, the measure leaves open to the seller the choice as to the manner of soliciting retail sales by display; only when he seeks to localize his

commercial activity by temporarily establishing himself at a particular rented and temporary location within this State in his activity in displaying samples and seeking orders subjected to taxation. Although such activity may be in the twilight zone of inter-state commerce, it does not enter that enchanted realm. Although such displaying by sample may ultimately result in orders which will flow into inter-state commerce, such commercial activity cannot cloak itself in immunity from taxation merely by calling the magic words "Interstate Commerce." The use of North Carolina real estate for the purpose of displaying samples is commercially intended to result in inter-state commerce, but this preliminary activity is merely a separate and distinct effort of the seller seeking, as in the instances of magazine and bill-board advertising, to stimulate the desire for the seller's goods. *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250.

The display use of hotel rooms and temporarily rented property here taxed is not a usual, necessary, or essential part of a commercial, retail business. It is a preliminary and incidental activity which, at the election of the seller, may or may not transpire prior to the beginning of the flow of events which constitute the movement of goods in inter-state commerce. There is a striking analogy here to production, which has consistently been held not to constitute inter-state commerce. *Carter v. Carter Coal Co.*, 298 U. S. 238. As Justice Brandeis, speaking for the Court in *Chasaniol v. Greenwood*, 291 U. S. 584 (587), so aptly remarked with reference to ginning and warehousing cotton, these are but "steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intra-state commerce." The use of North Carolina realty to display samples is likewise but a step "in preparation for the sale and shipment in interstate . . . commerce," and is essentially intra-state and local in nature. As was said by Justice Bradley in *Coe v. Erroll*, 116 U. S. 517 (525), "There must be a point of time when they cease to be governed exclusively by domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence

their final movement for transportation from the State of origin to that of their destination." Justice Bradley was there speaking of certain logs hauled to a river; but if the orders sought by plaintiff is substituted as the *res* under consideration the logic of the proposition is compelling that certainly not earlier than the actual placing of the orders with plaintiff can its commercial activity be considered as a part of interstate commerce. No phase of the question is better settled than the fundamental that the mere fact that the products of domestic enterprise are ultimately intended to become subjects of interstate commerce is not sufficient to stamp them with the immunities attaching to interstate commerce proper. *Kidd v. Pearson*, 128 U. S. 1 (21); *Heisler v. Thomas Colliery Co.*, 260 U. S. 245 (259); *Champion Refining Co. v. Corporation Commission*, 286 U. S. 210 (235).

The displaying of samples in temporary quarters, here taxed, was peculiarly a local and intra-state act, outside the realm of interstate commerce, because such term can "never be applied to transactions wholly internal, between citizens of the same community, or to a polity and laws whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such community." *Veazie et al. v. Moore*, 14 How. 568 (573). Such a local, business activity which is separate and distinct from the transportation and intercourse which is interstate commerce is not freed from state taxation "merely because in the ordinary course such transportation or intercourse is induced by the business." *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250 (253), and cases cited. In the same case, at p. 254, Justice Stone, speaking for the Court, reiterates the fundamental that, "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way'. *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252 (259), 39 S. Ct. 265, 266, 63 L. Ed. 590," and other cases cited. In the *Western Live Stock* cases, *supra*, the state privilege tax was upheld under a view which we think equally applicable here, to-wit, that "the burden on interstate business is too remote and too attenuated."

A casual reading of many of the recent pronouncements of the Supreme Court of the United States apparently indicates a gradual broadening of the Federal power over interstate commerce by liberalizing the definition of what falls within that category, with an accompanying, and even more desirable, broadening of the states' taxing power over matters touching the fringe of the garment of interstate commerce. This latter tendency is indicated by two complementary but distinct developments, the one marked by a narrowing of the compass of what constitutes a direct and undue burden on interstate commerce, and the other by a stricter and more rigid interpretation as to what constitutes discrimination against interstate commerce. See "Sales and Use Taxes: Interstate Commerce Pays Its Way," Warren & Schlesinger, 38 Col. Law Rev. 49 (Jan. 1938), for a collection of a number of these cases. These developments argue strongly for the validity of the instant tax.

In *Coverdale v. Pipe Line Co.*, 303 U. S. 604, a state tax upon the production of power to drive gas into interstate commerce was approved. The displaying of goods here taxed is merely a similar preliminary activity seeking to "drive" orders into interstate commerce. In *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U. S., 249, a state tax on storage of gasoline brought into the state through interstate commerce and ultimately used directly in interstate commerce was upheld, such a tax being considered too remote and too indirect a burden upon interstate commerce to justify its being stricken down. Here we have a similar situation, a local, commercial activity within North Carolina which follows the arrival of plaintiff's representative and precedes the sending of any orders to plaintiff. In *Southern Pac. Co. v. Gallagher*, 59 S. Ct., 389 (decided Jan. 30, 1939), the California Use Tax was upheld as applicable to equipment bought out of the State and brought into the State for installation on interstate, transportation equipment; there Justice Reed, for the Court, found a "taxable moment" at the point where the goods came to rest in the State and before they were installed on the interstate equipment. In the instant case there is no need for such search for a taxable moment, as the taxed activity was clearly localized in North Carolina; the displaying of the

samples was part of a carefully planned campaign, after an elaborate, personalized canvass by mail of large numbers of North Carolina citizens who were considered potential customers. As was pointed out in the *Gallagher* case, *supra*, "A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress." Also, it was there said: "The taxable event is the exercise of the property right in California"; here the taxable event is the exercise of the temporary property right in the hotel room or rented house to display samples commercially for retail purposes. *Pacific Telephone & Telegraph Co. v. Gallagher*, 59 S. Ct. 396, a companion case decided on the same day, again approved the California Use Tax as applied to supplies brought into the State for use in interstate telephone and telegraph communication.

Even earlier, in *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U. S., 147, and in *Henneford v. Silas Mason Co.*, 300 U. S., 577, the validity of the fundamental theory of the modern "use tax" had been approved; in the latter case, Justice Cardozo, for the Court, used these significant words in concluding the opinion: "A legislature has a wide range of choice in classifying and limiting the subjects of taxation. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S., 232 (237); *Ohio Oil Co. v. Conway*, 281 U. S. 146 (159). The choice is as broad where the tax is laid upon one or a few of the attributes of ownership as when laid upon them all. *Flint v. Stone Tracy Co.*, 220 U. S., 107 (158-9). * * * Such questions of fiscal policy will not be answered by a Court. The legislature might make the tax base as broad or as narrow as it pleased."

The Courts have not been alone in noting the economic imperative that "interstate business must pay its way." Students of taxation have become increasingly aware that a judicial overemphasis upon the doctrine of immunity of interstate commerce from state taxation amounts to discrimination against intra-state business. Lutz, H. L., *Public Finance*, 3rd ed., (1936), p. 326. State tax adminis-

trators have found it difficult to reach taxpayers in interstate commerce even when the plain and obvious intent was to tax them on the same basis as those engaged in intra-state commerce. R. M. Haig, "The Co-ordination of the Federal and State Tax Systems," *Proceedings of the National Tax Association*, (1932), p. 220; Marvel Stockwell, "The Co-ordination of Federal, State and Local Taxation," *The Tax Magazine*, (April, 1938), p. 198-9. None too soon, perhaps, the Supreme Court of the United States appears to have adopted a new approach to the problem of state taxation as it relates to interstate commerce, and approach involving a new emphasis upon the preservation of equality of tax burden between competing business enterprises. See William B. Lockhart, "The Sales Tax in Interstate Commerce," 52 *Harvard Law Review* (Feb. 1939), p. 617.

The tax here discussed is a part of a comprehensive, state tax program designed to reach and to tax equally and fairly all types of commercially remunerative activity which has the protection of our laws. Local mercantile businesses, which for the most part are small, are subject to taxation; the commercial activity of plaintiff, which is a comparatively large business enterprise, has heretofore escaped taxation in the State. If this tax fails in its effort to secure from plaintiff its proportionate contribution in taxes for the privileges and protections which it enjoys within the State, the immunity of plaintiff from taxes in this State will be complete. The reasoning leading to such a result we do not find persuasive. We do not find in the grant of power to Congress to regulate interstate commerce any implied prohibition which strikes down the tax here levied. Rather do we find in the reservation to the State of powers not granted to the United States (U. S. Constitution, X Amendment), coupled with the retention in the people of this State of "all powers not delegated" by our Constitution (N. C. Constitution, Art. 1, sec. 37), a mandate of organic law which is compelling in its implications. "In selecting the objects of taxation, in the classification of business and trades for this purpose, and in allocating to each its proper share of the expenses of government, the General Assembly has been given a wide discretion. The continued mainten-

ance of government itself as a great communal activity in behalf of all the citizens of the State is dependent upon an adequate taxing power." *Tobacco Co. v. Maxwell*, Commissioner of Revenue, 214 N. C., 367 (371-2).

For the reasons given, the judgment of the Court below is Reversed.

SEAWELL J. took no part in the consideration or decision of this case.

STACY, C. J., dissents.

EXHIBIT C.

IN THE SUPREME COURT OF NORTH CAROLINA, FALL TERM,
1939.

No. 451—Wake.

BEST & COMPANY, INC.,

v.

A. J. MAXWELL, Commissioner of Revenue.

DECISION ON REARGUMENT.

Petition to rehear this case reported in 216 N. C., 114.

Strauss, Reich & Boyer; M. James Spitzer; Manly, Hendren & Womble; and W. P. Sandridge for Plaintiff, Petitioner.

Attorney General McMulland and Asst. Attorneys General Bruton and Gregory, for defendant, respondent.

Bailey & Lassiter, amicus curiae.

CLARKSON, J.:

The petition deals with a matter of form and also with one of substance.

The petition alleges an inadvertence in the interpretation of petitioner's position in that it was stated that petitioner challenged the act only upon the ground that it violates the Commerce Clause of the Constitution of the United States, whereas petitioner likewise challenged the enact-

ment as "Offending against the privileges and immunities and the equal protection of the law clauses of the Constitution of the United States." It is contended by respondents that those matters were dealt with in substance, though without specific mention, in the body of the former opinion. However, to this extent the petition is allowed.

The petition further alleges error in the construction of the statute. The Court being evenly divided on this phase of the petition, Seawell, J., not sitting, the petition is sustained only to the extent above indicated.

Petition Dismissed in Part and Sustained in Part.

Winborne, J., concurring in the partial allowance of the petition and dissenting from its dismissal in part:

The opinion heretofore filed in this case imputes to the statute a meaning not warranted by its terms. The construction is a forced one. It is conceded on all hands that if the tax is laid on the privilege of taking orders for goods to be shipped in interstate commerce, the act offends against the Constitution of the United States.

The provision of the act is that: "Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of displaying such samples, goods, wares, or merchandise, and shall pay an annual privilege tax of two hundred fifty dollars (\$250.00), which license shall entitle such person, firm or corporation to display such samples, goods, wares, or merchandise in any county in this State." P. L. 1937, Chapter 127, Section 121, subsection (e).

This is the exact language of the statute. It admits only of the interpretation that it is a tax on the privilege of taking orders for goods to be shipped in interstate commerce. The authorities are one in holding that such legislation is unconstitutional.

Nor can the construction heretofore given to the statute save it from constitutional offence. If the tax imposed be a "use tax", it is discriminatory. *Leonard v. Maxwell*, 216 N. C., 89.

STACY, C. J., and BARNHILL, J., join in this opinion.

EXHIBIT D.

DECISION OF SUPREME COURT OF THE STATE OF SOUTH CAROLINA IN *STATE v. YETTER*, 192 S. C. 1; 5 S. E. (2d) 291.

STABLER, C. J.:

In February, 1938, the Legislature passed an act (40 Stat. at Large, 1569), requiring the payment of a license for the temporary display of samples, goods, wares or merchandise for the purpose of securing sales at retail. The defendant, a traveling salesman in the employ of Best & Company, a corporation, with its principal office and place of business in New York City, came to South Carolina in September, 1938, to secure for his employer orders for merchandise. With this object in view, he displayed his samples or goods in a room in the Columbia Hotel, in the City of Columbia, the room being rented or occupied for that purpose. The defendant took or accepted orders only, Best & Company shipping the goods direct to the customer, who paid for them by remittance direct to New York upon receipt of the merchandise and of bill therefor. Payment of the license tax was refused by the defendant, and he was thereupon arrested and tried in the Magistrate's Court for violation of the act. His defense was that the statute in question was a burden upon interstate commerce as prohibited by Section 8 of Article I of the Federal Constitution. Being convicted as charged, he appealed to the Court of General Sessions for Richland County, where the matter was later heard by his Honor, Judge Bellinger, who filed an order on July 12, 1939, holding the act to be unconstitutional, "in so far as it is attempted to be applied in this particular case". He accordingly reversed the judgment of the magistrate and ordered the defendant released.

Counsel for the appellant, the State, have filed with this Court a persuasive argument, and while we approve some of the things said, we are unable to agree with the contention that the circuit Judge, for the reasons urged, should be reversed. An examination of the decisions of the United States Supreme Court pertinent to the questions involved, those cited in the order and others not cited, as well as of the decisions of our own Court which may have a bearing thereon, satisfies us of the correctness of the conclusion reached by Judge Bellinger; and while we deem it unnecessary to add anything to what is said in his order, we will briefly refer to *Best & Co. v. Maxwell* (N. C.), 3 S. E. (2d) 292, which is strongly relied upon by counsel for the appellant. The North Carolina Supreme Court held, the facts and the questions there involved being practically the same as those in the case at bar, that the tax was not invalid as violative of the commerce clause of the Federal Constitution. While we have the greatest respect for the decisions of that Court, we are not in accord with its conclusions in the Maxwell case, in view of the applicable decisions of the United States Supreme Court, which necessarily control in questions of this kind. Furthermore, we have been advised that a rehearing has been granted in that case, thus leaving the Court's final action in doubt.

The order appealed from, which will be reported, is Affirmed.

Carter, Bonham, Baker and Fishburne, JJ., concur.

Order of Judge Bellinger.

This case comes before me on appeal from the Court of Magistrate Wm. A. Gunter of Richland County, from a conviction and sentence of the defendant charged with violation of Act No. 705, page 1569, Acts of the General Assembly of 1938. This pertinent part of the Act that the defendant is charged with violating is as follows:

"Section 1. License for Temporary Display of Samples, Goods, Wares or Merchandise Secure Sales at Retail—Be it enacted by the General Assembly of the State of South

Carolina: That every person, firm or corporation not being a regular retail merchant in the State of South Carolina who shall display samples, goods, wares or merchandise in any hotel room or in any room or house rented or occupied temporarily for the purpose of securing orders for the retail sale of such goods, wares or merchandise so displayed, shall apply for in advance and procure a State License from the South Carolina Tax Commission for the privilege of displaying such samples, goods, wares or merchandise, and shall pay an annual privilege tax of two hundred and fifty (\$250.00) Dollars, which license shall entitle such person, firm or corporation to display such samples, goods, wares or merchandise in any County of this State: *Provided*, That this act shall not apply to displays of samples, goods, wares or merchandise at conventions, expositions or fairs."

The Act provides that one convicted of violating its terms shall be punishable by a fine not exceeding one hundred (\$100.00) dollars, in addition to the payment of the license or by imprisonment not exceeding thirty (30) days.

The agreed facts are: That the defendant is not a regular retail merchant in the State of South Carolina; that at the times alleged in the warrant he was displaying samples, goods, wares or merchandise in a room in the Columbia Hotel, Columbia, South Carolina, which had been rented or occupied for the purpose of securing orders for the retail sale of such goods, wares or merchandise. It was testified to by the defendant, and not denied or contradicted by the State, that he was a resident of the State of New York; that his salary and expenses were paid direct from the New York office; that he only took orders for goods, which orders were forwarded to New York, to be filled and the goods were shipped by mail to the customer; that the defendant received no money or payment from the customer, and made no deliveries, but only solicited orders for goods desired from the samples displayed; that the persons invited to see the samples were those selected by the New York office and notified of the display of the goods by that office; that collection for the orders filled was left to the New York office.

Upon the trial of the defendant the Magistrate found him

guilty of violating the Act in question, and imposed sentence upon the defendant in accordance with the Act. It is from this judgment and sentence that the defendant appeals to this Court, on the following grounds: "That the Magistrate erred in finding the defendant guilty because the Statute in question, Act 705 of 1938, is unconstitutional, null and void, in that it interferes with interstate commerce and is in violation of Article I, Section 8, of the Constitution of the United States, and that it abridges the privileges and immunities of citizens of the United States and deprives the defendant of his liberty and property without due process of law and denies to the defendant equal protection of the laws in violation of Article XIV, Section 1, of the Constitution of the United States, and Article I, Section 5, of the Constitution of South Carolina."

The defendant has not argued the contention of the unconstitutionality of the Act under the due process clauses of the State and Federal Constitution; therefore, this Court will not consider the appeal upon those grounds.

Both appellant and respondent have relied upon the effect of "the interstate commerce clause" of the Federal Constitution as controlling the determination of this case. The only question to be decided is, whether or not Act No. 705, Acts of the General Assembly of 1938, imposes a burden or restriction under interstate commerce as prohibited by Article I, Section 8, of the Constitution of the United States?

Section 8, sub-division 3, of Article I of the Federal Constitution, delegates to the Congress of the United States the power "To regulate commerce with foreign nations, and among the several States and with the Indian Tribes." This commerce among the several States has been defined in the case of *State v. Holleyman*, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567, 11 L. R. A. (N. S.) 552, 24 L. R. A. (N. S.) 175, 2 A. L. R. 1094, thus: "Interstate commerce ordinarily consists of three elements, to wit: (1) The purchasing of merchandise by a resident of one State from a resident of another State: (2) the delivery of the articles of commerce; and (3) the transportation thereof. The purchase may be made by the buyer in person, or through a

traveling salesman of the non-resident, or by an order sent by the purchaser to the non-resident. The delivery may be made directly to the purchaser when the goods are sold, or when they reach their destination, in cases where they have been consigned to him." (*Italics added.*)

The facts in the case at bar squarely fit the foregoing definition. The defendant in the instant case was a traveling salesman for the non-resident seller; he took the order for the merchandise, forwarded it to the non-resident seller who in turn shipped it from the foreign State to the resident purchaser in this State and delivery was made by the carrier. Each element of the definition of interstate commerce is present in this transaction and as I view it, each step is a necessary link in the chain. It is argued that the tax as imposed is not for soliciting business or for taking orders but for the privilege of displaying the goods in a temporary show room and therefore does not impose a burden or restriction on interstate commerce. I cannot agree with this theory. Each act done by this defendant was a related and necessary step in the consummation of a transaction in interstate commerce. It is true that the defendant's principal does not have to come into this State to transact business and the clear intent of this Act is to discourage, to say the least, his doing so; however, it is his right to do so and the article of the Constitution here invoked was specifically included so that such business or commerce could be freely transacted between residents of the several States without hinderance and burden.

In the conclusion I have reached, I am amply supported by the decisions of our Supreme Court and the United States Supreme Court. In the *Holleyman* case, *supra*, the defendant and others were transporting liquor from North Carolina to their homes in this State after dark, in their own vehicles; they were arrested in this State for violation of a statute which prohibited transporting liquor in the State after dark. Upon appeal from the conviction, our Supreme Court, by divided opinion upheld the conviction, but upon rehearing before an *en banc* Court, this decision was reversed and likewise the judgment of the lower Court. The sole point in issue in that case, as here, was whether or not such a Statute was prohibited by the interstate com-

merce clause of the Federal Constitution and the final decision resolved that question in the defendant's favor. In the case just referred to, the defendant, a resident of South Carolina, purchased and received in North Carolina a package of liquor and was transporting same from that State to this State in his own vehicle. Our Supreme Court held that while the liquor was being transported and until the defendant arrived at his home, he was engaged in interstate commerce and to arrest Holleyman and confiscate the liquor was such a burden upon that commerce as is prohibited by the commerce clause of the Federal Constitution.

Under very similar facts as in the case at bar, the United States Supreme Court, in the case of *Robbins v. Taxing District of Shelby County (Tennessee)*, 120 U. S. 489, 30 L. Ed. 694, held that a statute, similar to the one here involved, was unconstitutional as repugnant to the "Commerce Clause". In that case the Court fixes the point at which a transaction becomes interstate commerce, using this language: "But to tax the sale of such goods or the offer to sell them before they are brought into the State, is a very different thing and seems to me clearly a tax on interstate commerce itself. * * * *The negotiation of sales of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made is interstate commerce.*" (Italics added.)

In the case at bar, the displaying of samples of goods to be purchased in another State is an element in the negotiation for the sale, and, therefore, constitutes interstate commerce. With facts and Statutes very similar to the case at bar, the United States Supreme Court has consistently held those Statutes to be restrictions upon interstate commerce and therefore invalid. *Stockard v. Morgan*, 185 U. S. 27, 46 L. Ed. 785; *Crenshaw v. Arkansas*, 227 U. S. 389, 57 L. Ed. 565; *Brennan v. City of Titusville (Penn.)*, 153 U. S. 288, 38 L. Ed. 719; *State v. Emert*, 130 Mo. 241, 23 Am. St. Rep. 874, 156 U. S. 296, 39 L. Ed. 430; *Real Silk Hosiery Mills v. City of Portland (Oregon)*, 268 U. S. 325, 69 L. Ed. 982.

In the case of *State v. Emert, supra*, the Missouri Supreme Court held: "the sale of goods which are in another

State at the time of sale for the purpose of introducing them into the State, in which a regulation concerning their sale is made, is interstate commerce, and a tax upon them before they are brought into the State is a tax on interstate commerce. The imposition of a license tax on the person so making sale of them is also, in effect, a tax upon the goods, and illegal, because the State cannot tax goods beyond its jurisdiction; but as soon as the goods are brought into the State, and have become a part of its general mass of property, they become taxable the same as other similar property within the State." This holding of the Missouri Court was affirmed by the United States Supreme Court.

In *Brennan v. City of Titusville*, *supra*, the very question here presented was passed upon, and it was there held that a regulation as to the manner of sale of subjects of commerce, whether by sample or not, and by exhibiting samples is a regulation of commerce and that an ordinance requiring a license of a manufacturer of goods in carrying on his business in another State by sending his agent there to solicit orders, conflicts directly upon the provisions of the Federal Constitution regulating interstate commerce which is within the exclusive jurisdiction of the Federal Government. Mr. Justice Brewer, delivering the opinion of the Court said: "It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free." Again quoting from the same authority: "It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a State may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode

ceased to be possible. And, notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent regulate it." The Court reviewed numerous decisions in which it had passed upon similar questions and held that the license tax imposed in that case upon the defendant was a direct burden on interstate commerce and was, therefore, beyond the power of the State.

The respondent relies strongly upon the case of *Best & Company Inc. v. A. J. Maxwell*, Commissioner of Revenue, decided by the Supreme Court of North Carolina and filed June 16, 1939, to sustain the validity of our Act on the same subject. The main provisions of the North Carolina Act are identical with ours, and the North Carolina Court held their Act to be constitutional. Notwithstanding in that case, like in the case before this Court, the facts were similar. The North Carolina decision was not concurred in by the entire court, but I have not before me the dissenting opinion.

The writer holds the decisions of our sister State in the highest regard, but he finds himself unable to concur in the opinion of that Court upon the question here presented. In view of the numerous decisions of the United States Court, holding that the Statute of this kind under the facts in the instant case places a burden upon interstate commerce in contravention of the Federal Constitution, he finds himself in disagreement with the North Carolina decision.

There being a Federal question here involved, it is to the decisions of the United States Supreme Court that we must look for the proper interpretation of the commerce clause of the Federal Constitution upon the subject that is here being dealt with. And, reluctant as this Court is to declare an Act of our Legislature unconstitutional, it has no alternative, in view of the decisions heretofore cited, as well as others, than to hold that the Act in question, in so far as it is attempted to be applied to the defendant in the instant case under the facts here presented, clearly contravenes the Federal Constitution by placing a burden upon and attempting to regulate interstate commerce. It, there-

fore, follows that the defendant has, under the facts in this case, been convicted under a Statute which as to him is void.

The following cases from our own Court bear very strongly upon the question involved in the instant case: *Jewel Tea Co. Inc. v. City of Camden*, 171 S. C. 353, 172 S. E. 307. *Zeigler v. Puritan Mills*, 188 S. C. 367, 199 S. E. 420.

It is, Therefore, Ordered, Adjudged and Decreed, That Act No. 705, Acts of the General Assembly, 1938, page 1569, in so far as it is attempted to be applied in this particular case, is unconstitutional and of no force or effect.

It is Further Ordered; That the judgment of the Magistrate's Court in the instant case be, and the same is, reversed, and that the defendant be discharged.

EXHIBIT E.

DECISION OF SUPREME COURT OF THE STATE OF LOUISIANA IN
STATE OF LOUISIANA V. BEST AND COMPANY, — La. — (de-
cided November 27, 1939); Rearg. Denied April 2, 1940, —
La. —.

#35367.

STATE OF LOUISIANA

versus

BEST AND COMPANY.

Appeal from the First Judicial District Court, Parish of
Caddo. Hon. E. P. Mills, Judge.

ODOM, J.:

The defendant is a New York corporation and operates a retail and mail-order store in New York City. It has no place of business in Louisiana, nor does it operate any store here. In October, 1938, one of its representatives brought into the City of Shreveport, this state, samples of

ladies' and children's wearing apparel, and displayed them in rooms leased for that purpose from a hotel. Defendant's representative did not sell and deliver, or offer to sell and deliver, any of the articles of merchandise on display. The articles of merchandise were samples and were displayed for the sole purpose of securing orders for the retail sale of similar merchandise to local customers for future delivery from the store in New York City.

Mr. Yetter, defendant's representative, was not authorized to deliver any merchandise or to accept payment therefor. All he was authorized to do, and all that he did, was to display the samples, take orders, and forward them to the defendant in New York City. The orders were subject to the approval of the defendant at its home office. If the orders were accepted, the goods were either charged to the accounts of the customers or shipped to them C. O. D., at their option. Nothing was shipped to Mr. Yetter for delivery, but all shipments were made to the customers direct. The display of samples was advertised by the mailing of cards to prospective customers by the representative of the company, the cards setting forth the dates of display. The defendant does not manufacture the articles sold. But the articles are taken from its general stock in New York City and are shipped from there direct to the customers. These are the admitted facts.

The State ruled defendant to show cause why it should not pay a license tax of \$250.00, alleged to be due under Section 17, Act 33 of 1938, "for the privilege of displaying samples, models, goods, wares or merchandise in the Hotel Washington-Youree at Shreveport, Louisiana, for the purpose of securing orders for the retail sale of such goods, wares or merchandise, either for immediate or future delivery." (Quotation from State's petition.)

That part of the section of the statute under which this license tax is demanded reads as follows:

"Provided further, that every person, firm or corporation, not being a regular retail merchant in the State of Louisiana, who shall display samples, models, goods, wares or merchandise in any hotel, hotel room, store, store-house, house or other place, for the purpose of securing orders for

the retail sale of such goods, wares or merchandise, or others of like kind or quality, either for immediate or future delivery, shall apply for and procure, at least thirty days in advance, a license from the Collector of Revenue for the privilege of displaying such samples, models, goods, wares or merchandise, and shall pay, in addition to all other taxes and licenses, a license tax therefor of \$250.00 for each sixty days of any such display. This paragraph shall not apply to those making house to house or personal calls displaying samples and taking orders for shipment directly from the manufacturer."

Defendant in its answer admitted the facts as above stated. The defense set up in its answer is that the only business it transacted in this state was to display its samples, take orders for goods, send the orders to New York City, there to be accepted or rejected; that, if accepted, the goods were to be shipped direct to the customers, the price to be remitted direct to the company in New York City by the customer; that such business is interstate commerce; that the State of Louisiana is without power or authority to require a license fee or to levy a tax on the privilege of engaging in such business; that such a tax is an undue burden upon, and an interference with, interstate commerce, and is therefore in conflict with the provisions of Section 8, Article I, of the Federal Constitution, which provides that Congress shall have power, "To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."

There was a judgment in the Court below decreeing that the statute is unconstitutional. The State appealed.

The purpose of the law here under attack is to require all persons, firms, or corporations not being retail merchants in this State to pay a license tax for the privilege of displaying samples, models, goods, wares, or merchandise in a hotel, hotel room, or storehouse, or other place, when the purpose of making such display is to secure "orders for the retail sale of such goods, wares or merchandise, or others of like kind or quality, either for immediate or future delivery".

The license tax is not imposed for the bare purpose of displaying samples of merchandise in a hotel room or other place, but for the privilege of so displaying such wares "for the purpose of securing orders for the retail sale of such goods, wares or merchandise."

Counsel for the State advanced a theory that, because the samples, goods, or merchandise displayed by the defendant came to rest in Shreveport and were there displayed, and because the merchandise was not then in interstate commerce, the making of the display was a local business and subject to taxation in this state. He rests his argument upon the well-recognized principle, which is stated in 12 Corpus Juris, Section 153, page 109, as follows:

"In the exercise of its power wholly to exclude foreign corporations, or in its discretion, to permit them to do business within the state under such conditions and restrictions as it sees fit to impose, a state may exact a license fee or tax from foreign corporations engaged in interstate commerce for the privilege of doing local or domestic business within the state, and a statute or ordinance imposing such a tax is valid when it is so worded as to cover only intrastate commerce, as where it expressly excepts interstate business."

Counsel cites the above quoted text in support of his argument that the state may exact a license tax or fee from a foreign corporation engaged in interstate commerce "for the privilege of doing local or domestic business within the state." The defendant is a foreign corporation and is engaged in interstate commerce, and the state could unquestionably exact of it a license tax for the privilege of doing a local or domestic business. So that the rule announced above would be applicable to the case at bar if it were true, as counsel argues, that the defendant, by displaying its samples in a room at the hotel, thereby engaged in a local business. But, by displaying the samples under the circumstances and for the purpose disclosed by the agreed statement of facts, defendant did not engage in a local or domestic business.

The reason is obvious, and is this: that the displaying of the samples, which admittedly was for the purpose of securing orders for the sale of merchandise then in another state, was but a step—the first step—made in furtherance of interstate transactions. The defendant had no merchandise for sale in this state and made no sales here. The goods which it had for sale, and which its representative here offered for sale, were in the City of New York. Defendant's representative here did not, and could not under the authority delegated to him by his principal, consummate sales. All he was authorized to do, and all he did, was to solicit and take orders from local customers for the sale of articles of wearing apparel selected from the samples displayed, and send the orders so taken to defendant's main office in New York City, where the goods for sale were kept. The orders were either accepted, the goods were shipped direct from the store in New York to the customer in Louisiana. These being the undisputed facts, the defendant was engaged in interstate commerce. We can see nothing in such transactions that can be regarded as local business. Our conclusions in this respect are supported by a long and unbroken line of decisions by the United States Supreme Court and by this Court.

The displaying of samples was but a means of exhibiting to prospective customers the kind and quality of the wares which defendant had for sale, to get them interested and to induce them to make orders. The goods and merchandise displayed were property which came to rest in this state when deposited for exhibit in the hotel room. But they were not deposited there for sale. They were means and instrumentalities devoted solely to the end of furthering defendant's interstate business. The displaying of them in no proper sense constituted, or contributed to, the doing of a local business.

Counsel for the State concedes, as indeed he must, that, if defendant's representative had taken the samples of merchandise with him from door to door and had displayed them in that way in order to induce prospective customers to make orders and had taken orders just as he did at the hotel room and for the same purpose, the business thus transacted would not be subject to the license tax levied by

the act. But he thinks there is a distinction between the exhibiting of samples at a hotel room for the purpose of securing orders and the exhibiting of them from door to door for the same purpose. We do not concur in counsel's view. On principle it matters not where samples are displayed if the purpose of displaying them is to induce prospective customers to order goods to be shipped in interstate commerce. If the entire transaction is interstate in character, then each and every step taken in furtherance thereof is likewise interstate in character. The act of exhibiting samples of goods to induce customers to take orders for the sale of merchandise is not separable from the other steps taken to consummate the interstate business. Each step is a part of one complete transaction.

In *Cheney Bros. v. Massachusetts*, 246 U. S. 147, 38 Sup. Ct. 295, the Supreme Court decided the point raised and stressed by counsel for the State in the case at bar. The court was there concerned with an excise tax imposed by Massachusetts on each of seven foreign corporations on the ground that they were doing a local business in that state. Cheney Bros. was a Connecticut corporation, whose general business was manufacturing and selling silk fabrics. It maintained at Boston a selling office with one office salesman and four other salesmen who traveled through New England taking orders. The salesmen solicited and took orders subject to the approval of the home office in Connecticut. If the orders were approved by the home office, the goods were shipped direct to the purchasers. Cheney Bros. kept no stock of goods in Massachusetts, "but only samples used in soliciting and taking orders." No other business was transacted in Massachusetts. The Supreme Court said:

"We do not perceive anything in this that can be regarded as a local business as distinguished from interstate commerce. The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation."

This case is practically on all-fours with the case at bar. The case of *Ozark Pipe Line Corporation v. Monier, et al.*, 266 U. S. 555, 45 Sup. Ct. 184, is like it in principle. The Ozark concern was a Maryland corporation which maintained its principal office in the State of Missouri, where it kept its books and bank accounts; and from its office there it paid its employees within and without the state, purchased supplies, employed labor, maintained telephone and telegraph lines, entered into contracts for transportation of crude oil, and carried on various other activities connected with, and in furtherance of, its pipe-line operations. It owned and operated a pipe line, extending through Oklahoma and Missouri to a certain point in Illinois, through which pipe line it conveyed crude petroleum. It was therefore engaged in interstate commerce.

The State of Missouri attempted to collect from it an annual franchise tax, the contention in justification of the tax being that the corporation was also engaged in doing local business; that its ownership and use of property other than the pipe line—such as telephone and telegraph lines, pumping stations, passenger and truck automobiles, etc.—in the State of Missouri, and its various acts and activities within that state amounted to the operation of a strictly local business.

It was conceded by the state that the operation of the pipe line, through which crude oil was transported from Oklahoma, through Missouri, to a point in Illinois, was interstate business. The Court said:

“The tax is one upon the privilege or right to do business (*State, ex rel. v. State Tax Commission*, 282 Mo. 213, 234, 221 S. W. 721) and if appellant is engaged only in interstate commerce it is conceded, as it must be, that the tax, so far as appellant is concerned, constitutionally cannot be imposed. It long has been settled that a state cannot lay a tax on interstate commerce in any form, whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying it on. . . . (citing authorities) . . . Plainly, the operation of appellant's pipe line is interstate commerce and beyond the power of state taxation.”

Referring to the question whether the owning of property in the State of Missouri, which was used in connection with the principal business engaged in by the corporation, the court said:

"The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the state, were all exclusively in furtherance of its interstate business, and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected."

The defendant in the case at bar was unquestionably engaged in interstate commerce. In the case of *Robbins v. Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 Law Ed. 694, decided in 1887, the Court said:

"The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."

In *Real Silk Hosiery Mills v. Portland*, 268 U. S. 325, 45 Sup. Ct. 525, 69 Law Ed. 982, the Supreme Court quoted with approval the above language from the *Robbins* case. And in *Crenshaw v. Arkansas*, 227 U. S. 389, 33 Sup. Ct. 294, 57 Law Ed. 565, the Court referred to the *Robbins* case as "The leading case", and said that it had been strictly adhered to since its decision.

In *McClellan, Tax Collector v. Pettigrew*, 44 La. Ann. 356, 10 So. 853, *Pettigrew*, the defendant, was the agent of the Seth Thomas Clock Company, a corporation domiciled in the State of New York, and solicited orders for the sale of clocks, with a view of introducing them into this State. He exhibited samples, obtained orders, forwarded them by

mail to the clock company in New York, which shipped the clocks to points convenient to the purchasers in Louisiana. The clocks were delivered by the company at its own expense. The State sought to collect a license tax from Pettigrew, the agent of the corporation. The Court followed the Robbins case, *supra*, and held that Pettigrew was not liable for the license tax because the soliciting of the orders by him in this state, for the sale of clocks in another state, did not constitute a sale of the clocks but a negotiation for the sale, and that the clause of the Constitution of the United States which declares that Congress shall have the power to regulate commerce among the several states extends to negotiations for the sale of manufactured articles solicited in another state. It was held, to abstract from the syllabus, that:

"any license tax imposed upon an agent or solicitor for soliciting orders for said goods, by sample, is in violation of said clause of the Constitution of the United States."

We quote the following text from 15 Corpus Juris Secundum, Section 18, page 279:

"Transactions of interstate commerce comprehend every negotiation, initiatory and intervening act, contract, trade, and dealing between citizens of any state or territory, or the District of Columbia, with those of another political division of the United States, which contemplates and causes an importation into the state, either of goods; of persons, or of information."

As to the general rule that a state is prohibited from levying a tax on interstate commerce, this Court, in *State v. Schofield*, 136 La. 702 (718), 67 So. 557, said:

"And it is well settled that a license imposed upon the agent of a foreign corporation selling articles of commerce which at the time of the sale are in another state operates in restraint of interstate commerce, and in violation of the interstate commerce clause of the Constitution of the United States." (Citing *Tax Collector v. Pettigrew*, *supra*, and numerous decisions by the Supreme Court of the United States.)

In *State v. Read & Nott*, 178 La. 530, 152 So. 74, it was held that a license or occupational tax, as applied to a local representative of a non-resident commercial firm who solicits orders for merchandise to be shipped direct to buyers, was unconstitutional, being an unauthorized burden on interstate commerce. In that case, the agent of the non-resident commercial firm kept an office in the City of Shreveport, where he displayed samples and took orders, and also solicited orders as a drummer within his district. The orders were sent direct to the principal without the state, where they were accepted, filled, and shipped direct to the persons by whom they were ordered.

Act 8 of the Third Extra Session of 1935, denies to any foreign corporation doing business in this state, the right to present a judicial demand before any of the courts of the state unless and until it pays all license and excise taxes required of such corporations doing business in the State. In *Graham Mfg. Co. v. Rolland*, 191 La. 757, 186 So. 93, this Court held that this law was not applicable to a foreign corporation having no office or business establishment of any kind in Louisiana, which employs traveling salesmen who come into the state and solicit and receive orders for merchandise. The Graham Manufacturing Company is a Connecticut corporation, and through one of its salesmen sold merchandise to the defendant Rolland. Rolland failed to pay for the goods, and the plaintiff brought suit. Rolland sought to have the suit dismissed on the ground that plaintiff had not paid its license tax. The facts were that orders were received in this state by plaintiff's representative, the orders were sent by mail by the traveling salesman to the office of the corporation in Connecticut, where the orders were accepted or rejected. When the orders were accepted, the goods were shipped to the customers who ordered them. In holding that the statute referred to was not applicable to the plaintiff, this Court said:

"It is well settled that a state statute imposing a license tax upon foreign corporations doing business in the state is not applicable to a foreign corporation which has no office or place of business in the state, and which sells goods in the state only on orders received through traveling

salesmen—the orders being accepted in the foreign state, and the goods being shipped from that state. Such a state statute cannot be construed so as to apply to such business as we have described because such business is interstate commerce, and is therefore exempt from state taxation by the commerce clause in the Constitution of the United States, Article I, Sec. 8, Cl. 3, U. S. C. A. *Robbins v. Taxing District of Shelby County*, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694; *Caldwell v. State of North Carolina*, 187 U. S. 622, 23 S. Ct. 229, 47 L. Ed. 336; *International Text-Book Company v. Pigg*, 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 38 S. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537; *Real Silk Hosiery Mills v. City of Portland*, 268 U. S. 325, 45 S. Ct. 525, 69 L. Ed. 982, *McClellan v. Pettigrew*, 44 La. Ann. 356, 10 So. 853; *Pegues v. Ray*, 50 La. Ann. 574, 23 So. 904; *State v. Schofield*, 136 La. 702, 67 So. 557; *State v. Paramount-Publix Corporation*, 178 La. 818, 152 So. 534.”

Each of the cases cited above is pertinent to the issues involved in the case at bar. It is unnecessary to review them further.

We find no merit in counsel's suggestion that the tax imposed by Section 17, Act 33 of 1938, partakes of the nature of a use tax. The tax is a license tax pure and simple, and it was so designated in the State's petition, wherein it was alleged that the defendant was due the State \$250.00, “being the license tax due under the provisions” of said act.

For the reasons assigned, the judgment appealed from, declaring unconstitutional that portion of Section 17, Act 33 of 1938, which requires every person, firm, or corporation, not being a regular retail merchant in the State of Louisiana, to pay a license tax for the privilege of displaying samples, models, goods, wares, or merchandise in any hotel, hotel room, store, storehouse, house, or other place, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise, or others of kind or quality, either for immediate or future delivery, is affirmed.

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MAY 25 1940

CHARLES E. MORE CROPLEY,
CLERK**Supreme Court of the United States**

OCTOBER TERM, 1939

No. [REDACTED]

61

BEST & COMPANY, INC.,

*Appellant,**vs.*A. J. MAXWELL, Commissioner of Revenue of the State of
North Carolina.Appeal From the Supreme Court of the State of
North Carolina.**APPELLANT'S REPLY TO APPELLEE'S STATEMENT
OPPOSING JURISDICTION, AND BRIEF OPPOSING
APPELLEE'S MOTIONS TO DISMISS AND TO STRIKE
FROM THE RECORD.**LORENZ REICH, JR.,
M. JAMES SPITZER,
W. P. SANDRIDGE,
Counsel for Appellant.

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 961

BEST & COMPANY, INC.,

Appellant,

vs.

A. J. MAXWELL, COMMISSIONER OF REVENUE.

APPELLANT'S REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION, AND BRIEF OPPOS- ING APPELLEE'S MOTIONS TO DISMISS AND TO STRIKE FROM THE RECORD.

In the statement opposing jurisdiction and motion to dismiss, the appellee, contending that no substantial federal question is involved, presents the following arguments:

1. That the Supreme Court of the State of North Carolina had the right to construe a taxing statute of that State, and that its construction thereof is binding upon this Court;
2. That the said statute as construed by the Supreme Court of North Carolina does not violate the Commerce Clause of the Constitution of the United States; and
3. That the said statute does not violate Section 2 of Article IV of, or Section 1 of the Fourteenth Amendment to, the Constitution of the United States.¹

¹ The appellant does not challenge the statute as abridging its privileges and immunities under either provision.

The appellee has also moved to strike from the record the license issued to the appellant by the appellee as Commissioner of Revenue, on the ground that the license was not introduced in evidence and is not part of the record below.

The statement opposing jurisdiction is not confined to matters or grounds making against the jurisdiction of this Court asserted by the appellant, but dwells considerably upon the merits of the issues raised by the appeal.

Consistently with the rules of this Court, we shall consider herein primarily the question of jurisdiction and shall advert to the merits only so far as necessary to show that a motion to dismiss does not properly lie.

The Issue.

It is undisputed that the appellant's activities in North Carolina are solely directed at the solicitation of orders for the purchase of goods to be shipped interstate, and that only interstate sales actually result therefrom.

The statute challenged exacts a fixed-sum tax (described in the statute as a "privilege tax") as a condition to the transaction of such business.

It provides that any one not a regular retail merchant in the State, who displays samples of goods in a hotel room (or temporarily rented or occupied house) for the purpose of securing orders for the retail sale of such goods so displayed, shall procure a State license for the privilege of displaying such samples and shall pay an annual privilege tax therefor. The license entitles the merchant to conduct the display.

It is conceded that the appellant, a New York corporation, having no place of business or agent in North Carolina and not domesticated there, displayed for a few days in a hotel room in Winston-Salem, North Carolina, samples of its merchandise for the purpose of obtaining orders for the retail sale of similar goods for future shipment in interstate commerce; that no merchandise was sold or delivered and none was offered or available for that purpose; that the orders

taken were all forwarded to and were subject to acceptance at the appellant's New York office; that the orders accepted were filled by interstate shipment from New York direct to the customers in North Carolina; that no money was collected at the time of the display and that all payments for the merchandise were made by the customers direct to the appellant's New York office.

Tax was exacted from the appellant under the said statute and was paid by the appellant involuntarily and under protest, on the ground that the said statute is repugnant to the Constitution of the United States; this suit was instituted for the recovery of the amount thus paid.

If there is such a thing as a principle of law which is held *semper ubique et ab omnibus*, it is that the tax in question, exacted under the circumstances involved, is unconstitutional.

Robbins v. Shelby County Taxing District, 120 U. S. 489, and the long line of succeeding cases cited in the Statement as to Jurisdiction at p. 8.

ARGUMENT

I.

Only federal questions are involved and they are substantial.

The *only* issue involved in this suit is whether Section 121 (e) of Chapter 127 of the State of North Carolina Public Laws of 1937, as applied to the appellant, is repugnant to the Constitution of the United States.

That was the *only* issue raised by the appellant and the *sole* question decided by each of the State courts below, as appears from the following chronological statement:

1. The complaint and the amended complaint were expressly predicated solely upon the invalidity of the said statute as in contravention of provisions of the

Federal Constitution (Statement as to Jurisdiction, pp. 3, 4);

2. The answer denied the invalidity and unconstitutionality of the said statute. (Statement as to Jurisdiction, p. 4);

3. The federal questions were the only questions raised and presented by the appellant on the trial of the action in the court of first instance (Statement as to Jurisdiction, p. 5);

4. The opening sentence of the prevailing opinion of the Supreme Court of the State of North Carolina expressly states that the *only* question raised by the appeal was whether the tax levied under the said statute was "invalid as violative of the Commerce Clause of the Constitution of the United States" (216 N. C. 114, 115; 3 S. E. [2d] 292, 293; Statement as to Jurisdiction, p. 24); and the final judgment was based *solely* upon the ground that the said statute did not violate the said clause of the Federal Constitution;

5. The decision of the said Court on reargument granted the appellant's petition to the extent that it showed that the said statute was challenged by the appellant as infringing both the Commerce Clause and Section 1 of the Fourteenth Amendment; and the opinion of three of the six Justices of the said Court who participated concurred in the allowance of the petition for reargument to that extent, and dissented from its dismissal in part on the ground that the said statute offended against the Constitution of the United States (217 N. C. 134, 6 S. E. [2d] 893; Statement as to Jurisdiction, pp. 32-34);

6. The Chief Justice of the said Court has, by certificate filed herein, certified that the questions sought to be argued by the appellant are substantial federal ques-

tions, that they were duly and properly raised, and that they are available for review by this Court upon appeal.²

It is manifest that the federal questions involved are substantial and of surpassing public importance, when we consider:

(a) That the courts of last resort of two sister States, viz., South Carolina and Louisiana, expressly repudiated the decision of the court below herein and held the corresponding and virtually identical statutes of those States repugnant to the Constitution of the United States (in suits to which appellant herein, or its representative was a party);

State v. Yetter, 192 S. C. 1, 5 S. E. (2d) 291 (Statement as to Jurisdiction, pp. 34-42);

State of Louisiana v. Best & Co., — La. — 195 So. 356; rehearing denied April 1, 1940; — La. —, — So. — (Statement as to Jurisdiction, pp. 42-52);

(b) That the final judgment of the court below was by an evenly divided court on reargument;

(c) That the prevailing opinion of the court below cited no direct authority in support of its conclusion; and

² The following is an excerpt from the certificate of the Chief Justice of the court below:

"That said Best & Company, Inc., duly and properly raised the following substantial federal questions which were considered and passed upon by the Supreme Court of the State of North Carolina, and are available for review by the Supreme Court of the United States upon appeal, to-wit:

(A) That said statute is repugnant to and infringes the commerce clause (Section 8 of Article I) of the Constitution of the United States.

(B) That said statute is repugnant to and infringes the equal protection and due process clauses (Section 1) of the Fourteenth Amendment to the Constitution of the United States."

(d) The certificate of the Chief Justice of the court below (see *supra*).³

In the case at bar there are presented only federal questions. We have discussed their substantial nature and their effect on public and private interests in the Statement as to Jurisdiction.

The matter presently before the Court is solely as to whether it should note probable jurisdiction. When, as here, all statutory requirements have been fully complied with, jurisdiction should not be denied, and an appeal should not be dismissed on motion for want of a substantial federal question, unless it appears that each question presented is so clearly lacking in merit that, upon mere citation of decisions of this Court, it may be put aside as not requiring further consideration.

Alton R. Co. v. Illinois Comm'n., 305 U. S. 548, 550;

Hamilton v. Regents, 293 U. S. 245, 258;

California Water Service Co. v. Redding, 304 U. S. 252, 255;

Levering & G. Co. v. Morrin, 289 U. S. 103, 105;

Milheim v. Moffat Tunnel Dist., 262 U. S. 710, 716-717;

Chesebro v. Los Angeles Co. Dist., 306 U. S. 459, 463.

³ Although the certificate of the Chief Justice of the State court cannot confer jurisdiction on this Court, it is entitled to great respect and serves to make more specific and certain the federal questions contained in the record. *Home for Incurables v. City of New York*, 187 U. S. 155, 158; *Louisville & Nashville R. R. v. Smith*, 204 U. S. 551, 561; *Honeyman v. Hanan*, 300 U. S. 14, 18-19; *Seaboard Air Line Ry. v. Duvall*, 225 U. S. 477, 481.

II.

Where a federal question is involved this Court is not bound by the form a statute bears or how it is characterized by the State court, but it should determine the true nature of the tax by ascertaining its operation and effect.

(In Reply to Appellee's Point I.)

The appellee seeks to avoid a consideration of the appeal herein on its merits by invoking the familiar rule (here inapplicable) that the construction placed upon a State statute by the highest court of the State is binding upon the Supreme Court of the United States.

In so doing, the appellee ignores the equally familiar rule that this Court is in duty bound to determine the question raised under the Federal Constitution upon its own judgment of the actual operation and effect of the tax, irrespective of the label it bears, or the manner in which it is construed by the State court.

Crew Leviek Co. v. Pennsylvania, 245 U. S. 292, 294;
Schuylkill Trust Co. v. Penna., 296 U. S. 113, 119;
Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249,
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Near v. Minnesota, 283 U. S. 697, 708;
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Kansas City Ry. v. Kansas, 240 U. S. 227, 231;
Galveston, Harrisburg & Ry. Co. v. Texas, 210
 U. S. 217, 227.

See also the following decisions relating specifically to fixed-sum license tax statutes:

Brennan v. Titusville, 153 U. S. 289, 299, 302;
Caldwell v. North Carolina, 187 U. S. 622, 624, 630-
 632;

Crenshaw v. Arkansas, 227 U. S. 389, 399-400;
Davis v. Virginia, 236 U. S. 697, 698-699.

The statute purports to impose a State license tax upon those who are not regular retail merchants in the State of North Carolina for the privilege of displaying samples in a hotel room, or temporarily occupied house, for the purpose of securing orders for the retail sale of goods, wares or merchandise so displayed, and provides that such license shall entitle such persons to display such samples, goods, wares or merchandise in any county in the State. The statute also authorizes counties, cities or towns to levy a license tax not in excess of the State license tax.

The court below held that the displaying of samples in temporary quarters was peculiarly a local and intrastate act, outside the realm of interstate commerce, and therefore that the tax as applied to the appellant did not infringe upon the Commerce Clause of the Federal Constitution. With this opinion one-half of the members of the court participating did not agree, and held the construction thus placed upon the statute to be "a forced one" which did not "save it from constitutional offence."

The appellee contends that the construction of the State statute by the highest court of the State precludes this Court from considering the federal questions, conceded in the prevailing opinion of the court below to be the only questions involved.

Reduced to its simplest terms, the gist of the appellee's argument is that no question is open to review by this Court, because the court below has decided that the statute in question does not impose an undue burden upon commerce between the States. If this contention were followed to its logical conclusion, no statute sustained as constitutional by a State court would ever be available for review by this Court.

The question whether a State law or a tax imposed thereunder deprives a party of rights secured by the Federal Constitution depends not upon the form of the act, nor upon

how it is construed or characterized by the State court, but upon its practical operation and effect.

American Mfg. Co. v. St. Louis, 250 U. S. 459, 462-463.

In the attempt to distinguish the tax assessed against the appellant from those numerous fixed-sum privilege, license, and occupation taxes on the business of soliciting orders for the purchase of goods to be shipped interstate uniformly held unconstitutional by this Court, the prevailing opinion of the court below labeled the tax a "use" tax.

We have inserted a marginal footnote which we believe demonstrates that such label is inconsistent with the true nature of the tax and a misnomer.⁴

As this Court succinctly stated in *Wagner v. City of Covington*, 251 U. S. 95, at p. 102:

"The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution; * * *."

⁴The label "use" tax was applied notwithstanding that in the opening sentence of the same opinion the tax is referred to as "the State tax upon the display of samples, goods, etc."; and notwithstanding that elsewhere in the same opinion the following expressions are used: "the commercial activity here taxed"; "under this statute the act taxed must occur in North Carolina, and the room where the act transpires must be within the State"; "the taxed activity must be directed at the retail trade in North Carolina"; "although such displaying by sample may ultimately result in orders which will flow into interstate commerce, * * *"; "the displaying of samples in temporary quarters, here taxed, was peculiarly a local and intra-state act * * *".

The words "use tax" appear nowhere in the statute: the subsection of the statute under which the tax was levied denounces it as "an annual privilege tax", and specifies that a "license" shall be procured "for the privilege of displaying such samples, goods, wares or merchandise"; the article of the statute in which this section is included is captioned "License Taxes", and Section 100 provides that "Taxes in this article or schedule shall be imposed as State license tax for the privilege of carrying on the business, exercising the privilege, or doing the act named, * * *".

The answer in this suit admits that the statute imposes a license tax, and that the sum sued for was collected as a license tax.

See also:

Macallen Co. v. Massachusetts, 279 U. S. 620, 626;
Lawrence v. State Tax Comm., 286 U. S. 276, 280;
Educational Films Corp. v. Ward, 282 U. S. 379,
 387.

Where the State court decides the question presented, not upon an independent State ground, but, deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment.

Indiana ex rel. Anderson v. Brand, 303 U. S. 95, 98.

The ruling below that the display of samples in a local hotel room constituted intrastate business in North Carolina does not foreclose this Court from considering and determining for itself whether the appellant's activities in that State actually constituted interstate commerce and whether the State law as applied to the appellant was repugnant to the Commerce Clause.

Kansas City Steel Co. v. Arkansas, 269 U. S. 148, 150;

Davis v. Virginia, *supra*, at pp. 698-699.

None of the authorities cited by the appellee derogates against the jurisdiction of this Court. Three of the decisions cited did not involve review of State court decisions, but arose in the federal courts. In all but one of the cases probable jurisdiction was noted and the federal questions involved were decided on the merits. None questions jurisdiction of this Court to determine upon its own judgment whether a State law or a tax imposed thereunder in its practical operation and effect deprives a party of rights secured by the Federal Constitution.

In three of the cases cited the Court held that a judgment by the highest court of a State as to the meaning and effect

of its own constitution is decisive and controlling everywhere (an issue not herein involved) ; but in each the federal questions involved were given consideration by this Court.

The only case cited by the appellee in which an appeal from a State court was dismissed was *Bacon & Sons v. Martin*, 305 U. S. 380, and the Court held therein that no substantial federal question was involved because the statute, as construed by the State court, had been applied in conformity with the principles declared in prior decisions of this Court.

In the case at bar an entirely different picture is presented. The court below, in construing the statute, failed and refused to apply the principle declared in *Robbins v. Shelby County Taxing District*, *supra*, and the long line of decisions following and approving it, and cited no direct authority in support of the conclusion reached.

Williams v. Eggleston, 170 U. S. 304, cited by the appellee, is direct authority in support of appellant's contention that this Court should note probable jurisdiction. In that case the motion to dismiss was overruled, on the ground that "it is not open to question that this court has jurisdiction" where sections of the Federal Constitution were specifically set up in the State courts and relied upon.

Since in this case substantial federal questions and only such questions are involved, and were properly raised, were necessary to the determination of the cause, and were actually decided, it is respectfully submitted that this Court should entertain jurisdiction and determine on the merits whether the operation and effect of the taxing statute, as applied to the appellant, is repugnant to the Constitution of the United States.

III.

There is involved the federal question of whether the taxing act, as construed, violates the Commerce Clause of the Federal Constitution.

(In Reply to Appellee's Point II.)

This, concededly, is the principal issue involved.⁵

A considerable portion of the Statement Opposing Jurisdiction is devoted to the argument that the taxing act does not violate the Commerce Clause, an issue which goes to the merits of the appeal but does not make against the jurisdiction of this Court.

The very discussion by the appellee of the issue as to whether or not the taxing act violates the Commerce Clause necessarily implies the presence of a federal question.

The statute herein, even as construed in the prevailing opinion in the court below, when applied to the appellant contravenes the Commerce Clause. The use of a local hotel room to display samples, concededly for the sole purpose of securing orders for the retail sale of goods to be delivered interstate, is not preliminary to or separable from commerce itself, and is so closely woven into the interstate transaction as to be an integral part thereof.⁶

"A regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at a dwelling house, is surely a regulation of commerce."

Brennan v. Titusville, supra, at p. 298.

⁵ See the opening sentence of the prevailing opinion of the court below.

⁶ This was the conclusion of the highest courts of the sister States of South Carolina and Louisiana in construing statutes in all pertinent and material respects identical in phraseology with the North Carolina statute as applied to the appellant or one of its employees. The South Carolina Court specifically declined to follow the decision of the North Carolina Supreme Court herein sought to be reviewed. Both opinions appear in the appendix to the Statement as to Jurisdiction (Exhibits D and E thereof).

"The name does not alter the character of the transaction, nor prevent the tax thus laid from being a tax upon interstate commerce."

Stockard v. Morgan, 185 U. S. 27, 36.

We respectfully submit that the distinction attempted to be made in the prevailing opinion of the court below is as transparent as was that attempted to be made by the Supreme Court of the same State and condemned by this Court in *Caldwell v. North Carolina*, *supra*.

Commerce among the States is a practical, not a technical, conception. From the point of view of commerce the entire transaction was one affair.

Davis v. Virginia, *supra*.

The statute casts its attendant burden only on those who are not regular retail merchants in the State of North Carolina. North Carolina retail merchants may conduct hotel displays to secure orders at any location in North Carolina without being subject to the tax, and local persons who are not merchants do not conduct hotel displays. The same hotel room may be occupied free of tax for any purpose by anyone other than an out-of-state retail solicitor. In its practical operation the burden of the tax is laid solely on extra-state merchants who attempt to sell their merchandise at retail through the channels of interstate commerce.

The tax is clearly an instrument of discrimination against interstate business. It appears to be aimed at suppressing or placing at a disadvantage the business of appellant and other extra-state merchants when brought into competition with intrastate merchants.

Fixed-sum license taxes aimed at such suppression were specifically condemned by this Court in *McGoldrick v. Berwind-White Co.*, 309 U. S. 33, which specifically approved the rule of *Robbins v. Shelby County Taxing District*, *supra*.

The appellee adverts to taxes which regular North Carolina retail merchants allegedly are required to pay. That argu-

ment is not pertinent to the question of jurisdiction, and we shall therefore defer consideration thereof.⁷

The appellee cites *Henneford v. Silas Mason Co.*, 300 U. S. 577, as authority for the imposition of the tax here in question. That case involved a use tax, and the basis of the decision of this Court therein was that property transported in interstate commerce may be subject to property tax not discriminatory in operation, after it has become part of the common mass of property within the State of destination. In the case at bar no property tax whatsoever is involved and the use of the samples on display, which concededly did not become part of the common mass of property within the State, was, in the language of Mr. Justice Cardozo, "so closely connected with delivery as to be in substance a part thereof." A use tax is predicated upon the ownership of property and not, as here, on the temporary occupancy of a local hotel room.

The opinion in the later use tax case of *Southern Pac. Co. v. Gallagher*, 306 U. S. 167, which relied upon and followed the decision in the *Silas Mason* case, cites with approval *Robbins v. Shelby County Taxing District*, *supra*, and several of the other authorities relied upon by the appellant.

Western Live Stock v. Bureau, 303 U. S. 250, and *Coverdale v. Pipe Line Co.*, 303 U. S. 604, cited by the appellee, are readily distinguishable. The businesses therein taxed fell within the line of precedents authorizing a State to tax a purely local business which is separate and distinct from the transportation or intercourse which is interstate com-

⁷ At this point, however, it might not be out of order to note that regular retail merchants of North Carolina, engaged in the same or a similar line of business as the appellant, are not subject to any fixed-sum license tax whatsoever for the privilege of engaging in such business in the State of North Carolina.

Under the statute counties and cities or towns are authorized to levy license taxes on the business taxed under the statute in an amount not in excess of the annual State license tax, and substantial sums have in fact been exacted from the appellant as local taxes under such enabling law. A regular North Carolina retail merchant who has his established place of business in another county is not subject to such local taxes.

merce. The former case was clearly distinguished on this ground in *McGoldrick v. Berwind-White Co.*, *supra*.

In the concluding portion of the appellee's Point II there are cited several cases, none of which conflicts with the principle enunciated in *Robbins v. Shelby County Taxing District*, *supra*, and the other authorities relied upon by the appellant, as more fully appears from recent decisions of this Court in which both lines of authorities were cited with approval.

Gwin, etc., Inc. v. Henneford, 305 U. S. 434, at pp. 437, 438, 441;

McGoldrick v. Berwind-White Co., *supra*.

The appellee begs the very question of jurisdiction by arguing that the construction placed on the taxing act by the court below saves it from condemnation of the principle established by *Robbins v. Shelby County Taxing District*, *supra*, and the other cases cited at page 8 of the Statement as to Jurisdiction.

Whether the statute as construed and applied to the appellant exceeds the constitutional limitation is a substantial federal question. And on that question, it is respectfully submitted, the appellant is entitled to be heard on the merits.⁸

⁸ Precedents abound for the noting of jurisdiction: cf. *Fisher's Blend Station v. Tax Com'n.*, 297 U. S. 650; *Crew Levick Co. v. Pennsylvania*, *supra*. See also *Western Live Stock v. Bureau*, *supra*, in which jurisdiction was noted notwithstanding that the decision on the merits sustained the State court.

IV.

There are also involved the federal questions of whether the appellant has been denied the equal protection of the laws and deprived of its property without due process of law.

(In Reply to Appellee's Point III.)

The substantial nature of these federal questions was set forth in the Statement as to Jurisdiction heretofore filed.

None of the arguments advanced by the appellee, and none of the cases cited by him, make against the jurisdiction of this Court; their bearing, if any, is upon the merits of the appeal.

In many of the cases cited by the appellee the State statute was held invalid as in conflict with the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States. Such citations are not authority against the principles urged by the appellant.

In order, therefore, not to extend this brief to undue length, we are deferring further consideration of these federal questions.

V.

The motion to strike should be denied.

The complaint and the amended complaint allege, the answer admits, and the parties stipulated for the record that on February 9, 1938 the plaintiff-appellant paid to the defendant-appellee the sum of \$250. pursuant to a demand made upon the appellant by the appellee under the section of the law, the validity of which is here involved, and that at the time of making such payment the appellant notified the appellee in writing that the said payment was made under protest.

The license which the appellee seeks by motion to strike from the record is that issued to the appellant by the appellee

as Commissioner of Revenue under the section of the law in question, and constitutes the receipt for the payment of tax aforesaid.

Section 182 of Chapter 127 of the State of North Carolina Public Laws of 1937 (Statement as to Jurisdiction, pp. 19-20) provides that the license tax levied under the said statute shall be paid to the Commissioner of Revenue who shall issue a license therefor.

To afford this Court the opportunity of seeing the license issued upon payment of the tax for the recovery of which this suit was instituted, with the form of which the court below was unquestionably familiar, the appellant requested, in its praecipe to the Clerk of the Supreme Court of the State of North Carolina, that a true copy of the license be included in the transcript of record herein.

The inclusion of such license in the record herein is solely for the information of this Court, and we respectfully submit that its inclusion is in no way prejudicial to the appellee, who, we should assume, would welcome the opportunity of having all pertinent and material facts before this Court.

CONCLUSION

Substantial federal questions are involved, fraught with both public and private consequences. It is, therefore, respectfully submitted that probable jurisdiction should be noted and the motion to dismiss should be denied.

It is further respectfully submitted that the motion to strike should be denied.

Dated, May 23, 1940.

Respectfully submitted,

LORENZ REICH, JR.,
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W. P. SANDRIDGE,
Counsel for Appellant.

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 61

BEST & COMPANY, INC.,

Appellant,

vs.

**A. J. MAXWELL, COMMISSIONER OF REVENUE OF THE STATE
OF NORTH CAROLINA.**

**APPEAL FROM THE SUPREME COURT OF THE STATE OF
NORTH CAROLINA.**

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT.

Opinions Below.

The original opinion delivered by the Supreme Court of the State of North Carolina is reported in 216 N. C. 114, 3 S. E. (2d) 292. Reargument was allowed, and on rehearing the said Court was evenly divided and two opinions were delivered, which are reported in 217 N. C. 134, 6 S. E. (2d) 893. No opinion was delivered in the Superior Court of Wake County, the court of first instance. (The judgment of that Court appears at R. 9.)

Jurisdiction.

The original judgment of the Court below was entered on June 16, 1939 (R. 19-20). Its judgment on rehearing was entered on February 2, 1940 (R. 47-48), and the original judgment thereupon became final for the purpose of appeal and review. The petition for appeal to this Court was filed and allowed on April 29, 1940 (R. 55-56).

Said final judgment is by the highest court of the State, in which a decision in the suit could be had; there was therein drawn in question the validity of the statute of the State of North Carolina hereinbelow referred to on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

The jurisdiction of this Court is invoked under Section 237(a) of the Judicial Code, as amended [28 U. S. C. §344(a)]. Probable jurisdiction was noted by this Court on June 3, 1940.

Statute Involved.

The particular subsection of the statute of the State of North Carolina, the validity of which is involved, is Section 121(e) of Chapter 127 of the State of North Carolina Public Laws of 1937, p. 208 [C. S. 7880 (51) (e)], which *verbatim* reads as follows:

"Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of displaying such samples, goods, wares or merchandise, and shall pay an annual privilege tax of two hundred fifty dollars (\$250.00), which license

shall entitle such person, firm, or corporation to display such samples, goods, wares, or merchandise in any county in this State."

The other pertinent provisions of the Article of the statute are set forth in the Appendix, at pp. 61-68, *infra*.

Statement of the Case.

Appellant, a New York corporation, is engaged in the retail apparel specialty store business in New York City, and it has no store or other place of business, officer or agent in North Carolina, and is not domesticated in that State (R. 7-8).

It brought the present suit in the Superior Court of Wake County, North Carolina, to recover ~~the~~ amount of tax collected from it by the appellee as Commissioner of Revenue of the State of North Carolina in purported compliance with the statute hereinabove set forth, and paid by it involuntarily and under protest on the ground that such statute was repugnant to the Commerce Clause and other provisions of the Constitution of the United States (R. 3-5, 8).

The case was tried on an agreed statement of facts (R. 7-9).

The Facts.

On February 9, 1938 appellant rented a room in the Robert E. Lee Hotel in Winston-Salem, North Carolina, where for a period of a few days it displayed samples of some of its merchandise to prospective customers, who were local residents invited by notices previously mailed from appellant's New York office. The articles on display were merely samples, which were exhibited to obtain orders for the retail sale of similar goods for future shipment in interstate commerce. No merchandise was sold or delivered

there, and none was offered or available for that purpose (R. 8).

The orders were taken subject to acceptance or rejection at appellant's office in New York, to which point all orders were forwarded. Those which were accepted were filled by shipment of the merchandise from New York direct to the customers by mail or through other regular channels of interstate commerce. The orders required and contemplated interstate deliveries for their fulfillment. No merchandise was sent to appellant's representative who conducted the display, and in no instance did he make, handle or aid the delivery thereof to the customer (R. 3-6, 8).

No payment or deposit on account of the purchase price was made or received at the time of the display. Invoices were sent from New York direct to the customers, who remitted payments to appellant's New York office (R. 4, 6, 8).

It is undisputed that the appellant's activities in North Carolina were directed solely to the solicitation of orders for the purchase of goods to be shipped interstate, and that in fact interstate sales only resulted therefrom (R. 8).

There is no issue as to the character of the merchandise, which was a legitimate subject of interstate commerce; and the tax does not purport to be exacted in the exercise of the police power of the State.¹

Solely because appellant was not "a regular retail merchant in the State of North Carolina", the appellee demanded that it obtain the State license and pay the fixed-sum license tax of \$250 prescribed by the statute here involved as a condition to and for the privilege of displaying its samples, which concededly was in furtherance of interstate sales (R. 8).

Section 181 of the law (Appendix, at p. 64) provides that it is unlawful to engage in any activities required to be licensed under the Article of the statute without first obtaining a license. Appellant therefore had no alternative but to pay the tax, which it did under written protest (R. 8).

¹ Cf. *Brennan v. Tifusville*, 153 U. S. 289, 298-299.

Appellee thereupon issued to appellant a "State Wide License", which expressly provides that it was for the privilege of "Displaying Merchandise" (R. 48A).

The appropriate procedure has been followed for compelling the return to appellant of the tax thus improperly demanded and collected (R. 8).

Appellee's answer admits that the sum thus demanded and paid was a license tax (R. 5).

The only issue raised by the pleadings, and the only issue involved in this suit, is whether the statute as applied to appellant is repugnant to the Constitution of the United States. This is exclusively a federal question.

The Proceedings Below.

On the trial of the action in the court of first instance only such federal questions were presented and judgment was rendered in appellant's favor (R. 9).

On appeal to the Supreme Court of the State of North Carolina the judgment was reversed, the Chief Justice dissenting (R. 11-20).

Appellant filed a petition to rehear and for correction of a statement contained in the original opinion as to the federal issues raised. The petition for rehearing was entertained and decided as follows:

In so far as it sought to correct the statement contained in the original opinion with respect to the federal issues raised, it was unanimously allowed (with one Justice not participating);

On the merits, the six participating Justices were evenly divided. The equal division was held to operate as an affirmance of the original opinion (R. 45-48).

Thus the final judgment was by an evenly divided court.

Inconsistencies in the Prevailing Opinion Below.

The displaying of samples by a drummer in a hotel room for the purpose of securing orders for the retail sale of goods to be shipped interstate into the taxing State was held to be "peculiarly a local and intrastate act, outside the realm of interstate commerce", and the tax as applied to appellant was therefore held not to infringe the Commerce Clause of the Federal Constitution.

This conclusion was reached despite the Court's recognition that appellant's activities in North Carolina were confined to the furtherance of interstate sales, as appears from the following excerpts from the prevailing opinion:

"The use of North Carolina real estate for the purpose of displaying samples is commercially intended to result in interstate commerce" (216 N. C. 114, at p. 117);

"Although such activity may be in the twilight zone of interstate commerce, it does not enter that enchanted realm. Although such displaying by sample may ultimately result in orders which will flow into interstate commerce, * * *" (*id.*, at p. 117);

"It is a preliminary and incidental activity which, at the election of the seller, may or may not transpire prior to the beginning of the flow of events which constitute the movement of goods in interstate commerce" (*id.*, at p. 117);

"The tax in no way hampers the movement of the samples, goods, etc., or of the merchandise sold, in interstate commerce" (*id.*, at p. 117).

Additionally, the reported statement preceding the Court's opinion contains the following pertinent sentence:

"It is likewise agreed that just prior to 9 February, 1938, plaintiff rented for several days a display room in the Robert E. Lee Hotel, in Winston-Salem, and there displayed samples and secured retail orders for merchandise, later filled by shipment from the New York office, and that the tax here in dispute was levied upon this activity of the plaintiff."

In the attempt to distinguish the tax assessed against the appellant from those numerous fixed-sum privilege, license and occupation taxes on the business of soliciting orders for the purchase of goods to be shipped interstate, uniformly held unconstitutional by this Court ², the prevailing opinion of the Court below labeled the tax a "use tax" for "the use of North Carolina real estate" (*id.*, at p. 117).

In applying this label the opinion disregarded the admissions contained in the pleadings, the plain and unambiguous provisions of the statute, the conflicting characterizations of the tax by the Court itself elsewhere in the same opinion, and the terms of the license issued to appellant upon payment of the tax, all of which were at direct variance with the "use tax" theory propounded. Cf. the following excerpts:

1. The answer:

"Answering paragraph 3, this defendant says that as Commissioner of Revenue he demanded and collected from the plaintiff the sum of \$250.00 due by it *as a license tax* levied under section 121(e) of Chapter 127 of the Public Laws of 1937, *which imposes a license tax* * * * " (R. 5).

2. Conflicting characterizations in the opinion:

"The only question raised by this appeal: Is the State tax upon the display of samples, goods, etc., * * * invalid as violative of the Commerce Clause of the Constitution of the United States, Art. I, sec. 8(3)?" (*id.*, at p. 115);

"the commercial activity here taxed" (*id.*, at p. 115);

"Under this statute the act³ taxed must occur in North Carolina, and the room where the act transpires must be within the State" (*id.*, at p. 116);

² See cases cited in Point I, pp. 17-18, *infra*.

³ The "act" is described a few lines earlier as follows: "the act, i. e., the display of samples, goods, etc." (*id.*, at p. 116).

"Although such displaying by sample may ultimately result in orders which will flow into interstate commerce, . . ." (*id.*, at p. 117);

"The displaying of samples in temporary quarters, here taxed, was peculiarly a local and intrastate act, . . ." (*id.* at p. 118);

"It is a use tax, levied in the State of North Carolina upon profitable and commercial activity" (*id.*, at p. 116).

3. The statute:

The words "use tax" appear nowhere in the statute;

Article II (which contains the subsection here involved) is captioned "License Taxes";

"§100. Taxes under this article.—Taxes in this article or schedule shall be imposed as State license tax for the privilege of carrying on the business, exercising the privilege, or, doing the act named, . . .

. . . (c) The State license thus obtained shall be and constitute a personal privilege to conduct the business named in the State license, . . . and shall be construed to limit the person, firm, or corporation named in the license to conducting the business and exercising the privilege named in the State license to the county and/or city and location specified in the State license, . . .";

§121, which contains subsection (e) here involved, is captioned "Peddlers." . . . "(e) Every person, firm, or corporation, . . . who shall display samples, goods, wares, or merchandise . . . shall apply for in advance and procure a State license . . . for the privilege of displaying such samples, goods, wares, or merchandise, and shall pay an annual privilege tax . . . which license shall entitle such person, firm, or corporation to display such samples, . . . (h) Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of the annual license levied by the State.";

"§181. Unlawful to operate without license.—When a license tax is required by law, . . . it shall be unlawful for any person, firm, or corporation without a

license to engage in such business, trade, employment, profession, or do the act; * * * and no person, firm, or corporation shall be allowed the privilege of exercising any business, trade, employment, profession, or the doing of any act taxed in this schedule throughout the State under one license, except under a state-wide license."

4. The license:

"* * * license is hereby issued to engage in the business or practice the profession of * * * *Displaying Merchandise*" (R. 48A).

(Italics in foregoing quotations ours.)

It is clear from the foregoing excerpts that the license was required for and the tax imposed upon appellant's commercial activities, not its use of North Carolina real estate.

The glaring inconsistencies in the prevailing opinion are strikingly shown in the dissenting opinion on rehearing (concurring in by one-half of the Court), as follows:

"The opinion heretofore filed in this case imputes to the statute a meaning not warranted by its terms. The construction is a forced one. * * * It [the statute] admits only of the interpretation that it is a tax on the privilege of taking orders for goods to be shipped in interstate commerce. The authorities are one in holding that such legislation is unconstitutional." (217 N. C. 134, 135-136.)

Related Decisions in Sister States Diametrically Opposed.

The decision below is squarely in conflict with the unanimous decisions rendered by the courts of last resort of the States of South Carolina and Louisiana, which expressly repudiate the decision of the Court below herein.

- *State v. Yetter*, 192 S. C. 1, 5 S. E. (2d) 291;
- State of Louisiana v. Best & Company*, 194 La. 918, 195 So. 356; rehearing denied April 1, 1940.

The facts in each case are in all respects the same as herein. The appellant herein was the actual appellee in each. (Its employee Yetter was the nominal respondent in the South Carolina case.)

The statute construed was in each case identical in phraseology (as to all material particulars, even as to rate of tax) with the statute here involved.

The Supreme Court of each such State held the corresponding statute of its State to be invalid as repugnant to the Commerce Clause of the Constitution of the United States.

Both Courts refused to following the decision of the Court below herein, cited in the South Carolina decision and offered in argument by the Attorney General in the Louisiana case.

Neither decision was appealed to this Court; and the time within which to appeal has expired.

The decision of the Court below is unique and *sui generis*.

Importance of the Issue.

Discriminatory regulation of interstate commerce by State legislation aimed at its very inception is of the gravest public concern.

This Court has uniformly voiced its condemnation of fixed-sum license taxes imposed, as here, on the business of soliciting orders for the purchase of goods to be shipped interstate.

In flagrant disregard of the established precedents, the evenly divided Court below upheld the exaction on the ground that it was imposed on only a local act preceding the interstate transactions.

The challenged statute on its face purports to tax the display of samples in a hotel room or temporarily occupied house for the purpose of securing orders for the retail sale of similar goods. By a tenuous line of reasoning, which does violence to the language of the statute and to the un-

disputed facts, the Court below construed the statute as taxing "the display use of hotel rooms and temporarily rented property."

The statute excludes from its operation regular retail merchants in the State of North Carolina.

If the constitutionality of such discriminatory legislation is upheld, its far-reaching consequences may readily be foreseen. The legislatures of many of the other States, importuned by local merchants and others motivated by personal and purely selfish reasons, will with alacrity enact similar allegedly "protective" statutes and ordinances. That was precisely the situation a half century ago when this Court, cognizant of such trend, first vigorously condemned this type of legislation.⁴

Since March 13, 1937, the date of the enactment of the challenged North Carolina statute, similar legislation has already been placed on the statute books of several other States. In 1938 South Carolina and Louisiana passed statutes almost identical in phraseology with that here challenged, and the Supreme Court of each of such States unanimously held such legislation invalid as repugnant to the Commerce Clause of the Federal Constitution.⁵

This division in judicial opinion alone suffices to illustrate the great public importance of the issue presented, particularly as the Court below was equally divided, and the prevailing opinion cites no direct authority in support of its conclusion.

The nominal amount of tax sought to be recovered is manifestly no criterion of the gravity and moment of the issue presented. This suit was instituted as a test case. The statute not only levies a State annual privilege tax of \$250., but it also authorizes counties, cities and towns to

⁴ An historical summary of the growth and extent of such attempted regulation of interstate commerce is contained in footnote 11 to the opinion of this Court in *McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 56.

⁵ *State v. Yetter*, *supra*; *State of Louisiana v. Best & Company*, *supra*.

levy a license tax, each in equal amount⁶; and many localities in the State have levied taxes pursuant to such enabling provisions. Since June 16, 1939, when the decision of the Court below was rendered, appellant has been obliged to pay, involuntarily and under protest, to the State of North Carolina and to its counties and cities the total sum of \$4,975., as a condition to its conducting eighteen exhibits in the State, none of which lasted over three days. When one State alone can exact such tribute in so short a period of time, it is apparent that the total of the concerted exactions of the several States would, for all practical purposes, amount to an absolute prohibition on the solicitation of interstate sales.

Additionally it should be observed that, if the solicitation of orders by retailers in the manner set forth in the statute is constitutionally subject to State and local regulation by license and fixed-sum license taxation, then by the same token such regulation and taxation may, and undoubtedly will, be extended to the solicitation of orders in interstate commerce by others. There would be no compulsion to limit it to retailers; it could, and undoubtedly would, be applied to wholesalers and manufacturers as well. Each State would adopt the formula suited to its particular industrial or commercial circumstances. Thus States with large market centers would attempt to stifle competing interstate trade by wholesalers and manufacturers of other States.

The maintenance of a free national market, unobstructed by discriminatory State legislation, is indispensable to the economic well-being of the nation.⁷ The throttling of in-

⁶ §121(h), Appendix, at p. 64, *infra*.

⁷ "This case again illustrates the wisdom of the Founders in placing interstate commerce under the protection of Congress. The present problem is not limited to Arkansas, but is of national moment. Maintenance of open channels of trade between the States was not only of paramount importance when our Constitution was framed; it remains today a complex problem calling for national vigilance and regulation."—Dissenting opinion in *McCarroll v. Dixie Lines*, 309 U. S. 176, 185.

terstate commerce by the setting up of discriminatory interstate barriers has consistently been recognized by this Court to infringe upon the Commerce Clause.

**Specification of the Assigned Errors Intended
to be Urged.**

The Supreme Court of the State of North Carolina erred:

1. In refusing to hold that the provisions of the statute here involved are repugnant to Section 8 of Article I of the Constitution of the United States, in that:

(a) The said statute operates to place a tax or burden on interstate commerce which amounts to an unlawful regulation thereof, and to discriminate against such commerce in favor of intrastate commerce in the State of North Carolina;

(b) The tax thereby imposed and exacted from appellant is a tax or burden on interstate commerce which amounts to an unlawful regulation thereof, and, as applied to appellant, is a fixed-sum license or privilege tax on the business of soliciting orders for the purchase of goods to be shipped in interstate commerce, and constitutes a discrimination against such commerce and an unlawful obstruction of one of the essential and ordinary means and instrumentalities by which such commerce is legitimately carried on;

(c) If the tax thereby imposed and exacted from appellant is a use tax, as held by the Court below, it nevertheless constitutes a tax or burden on interstate commerce which amounts to an unlawful regulation thereof, and, as applied to appellant, constitutes a discrimination against such commerce and an unlawful obstruction of one of the essential and ordinary means and instrumentalities by which such commerce is legitimately carried on;

and in holding that the provisions of said statute are not repugnant to the said clause of the Federal Constitution (Nos. 1, 2; R. 51-52).

2. In refusing to hold that the provisions of the said statute denied to appellant the equal protection of the laws in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the said statute creates a whimsical, arbitrary, and capricious classification and imposes a tax or burden on the business transacted, sales made, and property situated without and not subject to the jurisdiction of the State of North Carolina, and in that its purpose, object and effect are to discriminate against appellant and others who are not regular retail merchants in the State of North Carolina and in favor of local or regular retail merchants of said State who are not subject to the said tax; and in holding that the provisions of the said statute do not deny to appellant the equal protection of the laws (Nos. 3, 4; R. 52-53).

3. In refusing to hold that the provisions of said statute deprive appellant of property without due process of law in contravention of Section 1 of said Fourteenth Amendment, in that the tax imposed by the said statute and exacted from appellant was on the business transacted and sales made by appellant and property of appellant situated without and not subject to the jurisdiction of the State of North Carolina; and in holding that the provisions of the said statute do not deprive appellant of property without due process of law (Nos. 5, 6; R. 53).

4. In reversing and in refusing to affirm the judgment rendered by the Superior Court of Wake County, and in rendering final judgment in favor of appellee and against appellant (No. 7; R. 53).

Summary of Argument

I

The statute, as applied to appellant, the license required thereunder, and the tax exacted from appellant, constitute an unlawful regulation of and burden upon and discriminate against interstate commerce, and they are therefore repugnant to the Commerce Clause of the Federal Constitution.

1. The fixed-sum license tax thereby imposed on appellant's occupation of soliciting orders for the purchase of goods to be shipped interstate into the taxing State is an interference with and prohibited burden upon commerce between the States.
2. The rule of *Robbins v. Shelby Taxing District* has been followed and approved by the most recent pronouncements of this Court.
3. Discrimination against interstate commerce, and not equality, is both the theme of the statute and its practical operation and effect when applied to appellant.
4. Appellant's activities in North Carolina were confined exclusively to soliciting orders for the sale of goods in another State which contemplated and necessarily required interstate shipment for their fulfillment. They constituted an integral part of interstate commerce, and not a local or intrastate act separable therefrom properly subject to taxation by North Carolina.
5. A State may not require a license as a condition precedent to the pursuing of activities in interstate commerce.

II

The characterization of the tax as a "use tax" by the Court below does not save it from constitutional offense.

1. The tax challenged is not a "use tax".
2. Even if the tax exacted is a use tax, it is nevertheless a discriminatory and prohibited exaction.
3. This Court is not bound by the form a statute bears or how it is characterized by the State Court. It should determine the true nature of the tax by ascertaining its operation and effect.

III

The authorities relied upon in the prevailing opinion of the Court below do not support the conclusion there reached and are inapplicable.

IV

The license required and the tax exacted from appellant deny it the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

V

The tax exacted from appellant deprives it of its property without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

I

The statute, as applied to appellant, the license required thereunder, and the tax exacted from appellant, constitute an unlawful regulation of and burden upon and discriminate against interstate commerce, and they are therefore repugnant to the Commerce Clause of the Federal Constitution.

1. The fixed-sum license tax thereby imposed on appellant's occupation of soliciting orders for the purchase of goods to be shipped interstate into the taxing State is an interference with and prohibited burden upon commerce between the States.

The statute as applied to appellant fastens its grip directly and solely on interstate commerce by requiring a license and exacting a fixed-sum privilege tax for its transaction, which this Court has uniformly held to infringe the Commerce Clause.

Robbins v. Shelby Taxing District, 120 U. S. 489;

Corson v. Maryland, 120 U. S. 502;

Asher v. Texas, 128 U. S. 129;

Stoutenburgh v. Hennick, 129 U. S. 141;

Brennan v. Titusville, 153 U. S. 289;

Stockard v. Morgan, 185 U. S. 27;

Caldwell v. North Carolina, 187 U. S. 622;

Norfolk & West. Ry. Co. v. Sims, 191 U. S. 441;

Rearick v. Pennsylvania, 203 U. S. 507;

Dozier v. Alabama, 218 U. S. 124;

Crenshaw v. Arkansas, 227 U. S. 389;

Rogers v. Arkansas, 227 U. S. 401;

Stewart v. Michigan, 232 U. S. 665;

Davis v. Virginia, 236 U. S. 697;

Real Silk Mills v. Portland, 268 U. S. 325.

See also:

Welton v. State of Missouri, 91 U. S. 275;

Leloup v. Port of Mobile, 127 U. S. 640;

Lyng v. Michigan, 135 U. S. 161;

Crutcher v. Kentucky, 141 U. S. 47.

The law on this subject is so firmly entrenched that more than thirty years ago Mr. Justice Holmes considered it "established."⁸

The leading case⁹ is *Robbins v. Shelby Taxing District*, *supra*, which involved the constitutionality of a Tennessee statute requiring drummers and persons not having a regular licensed house of business in the taxing district to pay a fixed-sum license tax for the privilege of offering for sale or selling goods by sample. Robbins, an Ohio resident, represented a Cincinnati firm and solicited in Memphis orders for the sale of goods to be shipped interstate, and exhibited samples for the purpose of effecting such sales.

This Court held that:

"The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce" (at p. 497),

and that a State cannot levy a tax upon and require a license from the citizens of other States for seeking to sell their goods in the State before they are introduced therein. Such a tax is a burden upon interstate commerce.

The Court took pains to point out the fundamental distinction between the right of a State to tax goods which have "become part of its general mass of property" after they have been brought into the State in consequence of an interstate sale, and the attempt to tax "the offer to sell them, before they are brought into the state", which

⁸ *Rearick v. Pennsylvania*, *supra*, at p. 510.

⁹ So described in *Crenshaw v. Arkansas*, *supra*, at p. 395.

the Court holds "is a very different thing, and seems to us clearly a tax on interstate commerce itself" (at p. 497).

In reaching its conclusion the Court summarized the established principles on the meaning and effect of the Commerce Clause, and among the established doctrines set forth the following:

"But in making such internal regulations a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; * * * and no discrimination can be made, by any such regulations, adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject." (at pp. 493-494).

The facts in *Brennan v. Titusville, supra*, are closely analogous to those in the case at bar. Brennan's employer, a manufacturer of picture frames and maker of portraits, was located in Chicago. Brennan solicited orders for pictures and frames in Pennsylvania and other States by going personally to residents and exhibiting samples. Upon receipt of the orders he forwarded them to Chicago, where they were filled by shipment direct to the purchasers by common carrier. The purchase price was collected generally by the carrier, but sometimes by the agent, and forwarded to Chicago. Brennan was convicted of violating a city license tax ordinance, one of the provisions of which required all persons canvassing or soliciting orders for goods within the city to procure a license and to pay a fixed-sum privilege tax therefor. The ordinance exempted persons selling by sample to manufacturers, licensed merchants and dealers. The Pennsylvania Supreme Court affirmed the conviction.

This Court held the ordinance invalid as repugnant to the Commerce Clause, and reaffirmed the principle that a manufacturer of goods which are legitimate subjects of

commerce may conduct an interstate business, through solicitation of orders in any State by itinerant road representatives, without being subjected to State or local privilege taxation.

The ordinance challenged in *Real Silk Mills v. Portland*, *supra*, required every person, going from place to place to take orders for goods for future delivery and receiving payment of any deposit of money in advance, to secure a license, file a bond, and pay a fixed-sum license fee. The appellant therein was an Illinois corporation engaged in manufacturing silk hosiery at Indianapolis. It employed representatives in several States to go from house to house soliciting and accepting orders. The representatives filled out and signed in duplicate an order blank for specified goods, which also provided for a deposit on each box of hosiery. It directed the mailing of the merchandise from the mills, via parcel post C.O.D., direct to the customer. The local salesman forwarded a copy of the order to the mill in Indianapolis, where the goods were packed and shipped to the purchaser. The solicitor retained the cash deposit as his commission.

This Court held that the ordinance materially burdened interstate commerce in contravention of the Commerce Clause, and that such burden was not lessened by the payment of compensation to the solicitor through the retention by him of the advance partial payments.

In none of the cases above analyzed and in few, if any, of the other cases above cited did the facts make out so strong a case against the validity of the statute challenged therein as in the instant case. The representative of the out-of-State merchant or manufacturer in such cases not only displayed samples and solicited orders, as in the case at bar, but additionally in many there were circumstances not here present, such as the maintenance of a permanent office in the State, the fact that the agent was a resident of the State, the assembly and delivery of the merchandise to the customer within the State by the agent after accept-

ance of the order at the home office, or the collection of all or part of the price, none of which were held by this Court to militate against the fundamental principle that the transactions constituted interstate commerce.

The instant case is not the first in which the Supreme Court of the State of North Carolina utterly disregarded the *Robbins* rule. At least twice before this Court has found it necessary to reverse the North Carolina Court on precisely the same issue.

Caldwell v. North Carolina, supra;
Norfolk & West. Ry. Co. v. Sims, supra.

In the *Caldwell* case there was challenged an ordinance of the City of Greensboro which imposed a fixed-sum license tax upon persons engaged in the business of selling or dealing in picture frames, pictures, etc. Caldwell, representing a Chicago concern, went to Greensboro for the purpose of delivering pictures and frames previously sold by other employees. The merchandise had been shipped to a railroad freight station addressed to the employer, from which station Caldwell took the packages to a hotel room, there broke bulk, placed some of the pictures in their frames, and delivered the pictures to the purchasers. This Court held that the ordinance was invalid when applied to an agent of a corporation from without the State, as an attempt to interfere with and regulate interstate commerce; and that the transaction was not deprived of its interstate character by the facts that the pictures and frames were not assembled before they were brought into the State, and that the articles were not shipped separately and directly to each individual purchaser.

It seems more than a coincidence that in the *Caldwell* case the North Carolina Supreme Court upheld the statute as imposing a tax on activity transpiring after the interstate transaction had been completed, whereas in the case at bar the tax is sought to be justified as affecting only preliminary and incidental activity transpiring before the interstate transaction is commenced.

In the *Caldwell* case such reasoning was rejected by this Court, which pointedly held (at pp. 632-633):

"It cannot escape observation that efforts to control commerce of this kind, in the interest of the States where the purchasers reside, have been frequently made in the form of statutes and municipal ordinances, but that such efforts have been heretofore rendered fruitless by the supervising action of this court. The cases hereinbefore cited disclose the truth of this observation."

In the Attorney General's brief in the Court below in the instant case, he recognized that "the transaction taxed [in the *Caldwell* case] was undoubtedly one in interstate commerce."

The statute here challenged exacts from appellant a fixed-sum tax, therein designated as a "privilege tax," "for the privilege of displaying . . . samples, goods, wares or merchandise" "for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed"; and it further provides that the "license shall entitle such person . . . to display such samples."

Appellant, an extra-State merchant which had no place of business or agent in North Carolina, displayed samples of its merchandise for a few days in a hotel room in Winston-Salem for the purpose of obtaining orders for the retail sale of similar goods, which contemplated their shipment thereafter into the State through the channels of interstate commerce. Its activities in North Carolina were limited thereto. No merchandise was sold or delivered within the State and none was offered or available there for that purpose. The orders were all forwarded to, and were subject to acceptance at, appellant's New York office. Such orders as were accepted were filled by interstate shipment from New York direct to the customers in North Carolina. No part of the purchase price was collected at the time of the display and all remittances therefor were sent by the customers direct to appellant's New York office.

Appellant's activities in North Carolina constituted interstate commerce in its most basic form, as this Court held in *Crenshaw v. Arkansas*, *supra* (at p. 401):

"Business of this character, as well settled by the decisions of this court, constitutes interstate commerce, and the privilege of doing it cannot be taxed by the State."

The Supreme Court of the State of Louisiana unanimously held a statute of that State which is substantially a counterpart of the statute here challenged to be unconstitutional and invalid on the theory of *Robbins v. Shelby Taxing District* and several of the other cases cited *supra*.

State of Louisiana v. Best & Company, supra.

The meaning and effect of the statute were succinctly set forth (at pp. 923-924) as follows:

"The purpose of the law here under attack is to require all persons, firms, or corporations not being retail merchants in this state to pay a license tax for the privilege of displaying samples, models, goods, wares, or merchandise in a hotel, hotel room, or storehouse, or other place, when the purpose of making such display is to secure 'orders for the retail sale of such goods, wares or merchandise, or others of like kind or quality, either for immediate or future delivery'.

The license tax is not imposed for the bare purpose of displaying samples of merchandise in a hotel room or other place, but for the privilege of so displaying such wares 'for the purpose of securing orders for the retail sale of such goods, wares or merchandise'."

And (at p. 927) that Court further held:

"The act of exhibiting samples of goods to induce customers to take orders for the sale of merchandise is not separable from the other steps taken to consummate the interstate business. Each step is a part of one complete transaction."

Similarly, the Supreme Court of the State of South Carolina held the corresponding statute of its State repugnant to the Commerce Clause, on the ground that it imposed a fixed-sum license tax on the business of soliciting orders for the purchase of goods to be shipped interstate. In its decision it specifically stated that it was not in accord with the decision of the Court below herein, in view of the applicable decisions of this Court.

State v. Yetter, supra.

2. The rule of *Robbins v. Shelby Taxing District* has been followed and approved by the most recent pronouncements of this Court.

The prevailing opinion of the Court below cites no direct authority in support of the validity of the instant tax.¹⁰

It recognizes—yet fails to distinguish—the rule of the *Robbins* case.¹¹

It relies largely, as it states, upon the recent trend of this Court to broaden the “state’s taxing power over matters touching the fringe of the garment of interstate commerce”¹² and upon the adoption by this Court of “a new approach to the problem of state taxation as it relates to interstate commerce.”¹³

In Point III, at pp. 50-56, *infra*, we have analyzed each of the authorities cited therein, all of which are inapplicable and relate to taxes or regulations of an entirely different kind from that here involved.

¹⁰ A fairly exhaustive examination of the law on this subject discloses no final adjudication of a State court contrary to appellant’s contention. In our brief in the Court below there were cited over 200 State court decisions in 43 States, some of which appear in the appendix to the petition for rehearing (R. 31-35).

¹¹ It is noteworthy that the Attorney General conceded, in the court of first instance, that the *Robbins* case and others to like effect were in point and controlling, unless modified or overruled by later opinions of this Court.

¹² 216 N. C. 114, 118.

¹³ *Id.*, at p. 120.

In its opinion the Court below aptly uses the expression, "a casual reading of many of the recent pronouncements of the Supreme Court of the United States". Such reading must have been most casual indeed, because a more careful study would have shown, beyond peradventure of a doubt, that the rule of the *Robbins* case has been uniformly recognized in each of this Court's most recent pronouncements.

McGoldrick v. Berwind-White Co., 309 U. S. 33, 55-56¹⁴;

Southern Pacific Co. v. Gallagher, 306 U. S. 167, 174;

Gwin, etc., Inc. v. Henneford, 305 U. S. 434, 437, 441;

South Carolina Highway Dept. v. Barnwell Bros., 303 U. S. 177, 185, 186;

Cooney v. Mountain States Tel. Co., 294 U. S. 384, 392;

Minnesota v. Blasius, 290 U. S. 1, 9;

Helson & Randolph v. Kentucky, 279 U. S. 245, 250;

Texas Transp. Co. v. New Orleans, 264 U. S. 150, 152, 154 (see also dissenting opinion by Justices Brandeis and Holmes, which (at p. 157) cites the *Robbins* case as authority for the proposition that a tax may not be laid upon "a drummer or delivery agent . . . engaged exclusively in inaugurating or completing his own or his employer's transaction in interstate commerce").

That there is no conflict between the *Robbins* case and the cases relied upon by the Court below is clearly illustrated by the decision in *Southern Pacific Co. v. Gallagher*, *supra*, in which both lines of authority are cited with approval for the respective rules of law for which they properly stand: Mr. Justice Reed therein made a very careful analysis of both and, as to the first, states (at p. 174):

"The first makes it quite clear that a state tax upon the privilege of operating in, or upon carrying on,

¹⁴ The *McGoldrick* decision was rendered after the decision of the Court below.

interstate commerce is invalid. * * * A license tax on sales by samples burdens one selling only goods from other states." (Citing in footnote *Robbins v. Shelby Taxing Dist.*, *supra*, and *Brennan v. Titusville*, *supra*.)

The crux of the entire problem of State taxation as it relates to interstate commerce is succinctly set forth in that opinion (at pp. 177-178) as follows:

"The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax on its operations as such, is an interference. A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress."

What the Court below failed to recognize is that the incidence of the statute here involved is cast, not upon a separate taxable event in the State, but directly upon appellant's solicitation of orders for merchandise prior to their introduction into the State through the channels of interstate commerce which, as held in *Helson & Randolph v. Kentucky*, *supra*, at p. 250, the State is without power to tax.

The latest expression of this Court's condemnation of fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate is contained in the opinion in *McGoldrick v. Berwind-White Co.*, *supra*. Mr. Justice Stone sets forth therein the background of the rule in the *Robbins* case and the reasons for its adoption, and he characterizes the fundamen-

tal vice of statutes such as that here challenged (at p. 46, footnote 2) as follows:

"Lying back of these decisions is the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state."

And again (at pp. 55-57) this Court holds:

"It is also urged that the conclusion which we reach is inconsistent with the long line of decisions of this Court following *Robbins v. Shelby County Taxing District*, 120 U. S. 489, which have held invalid, license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. In some instances the tax appeared to be aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing intrastate sales. See *Robbins v. Shelby County Taxing District*, *supra*, 498; *Caldwell v. North Carolina*, 187 U. S. 622, 632. * * * It is enough for present purposes that the rule of *Robbins v. Shelby County Taxing District*, *supra*, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate."

As we read the latest decisions of this Court they indicate clearly and unmistakably that the rule of the *Robbins* case is controlling and determinative herein.

3. Discrimination against interstate commerce, and not equality, is both the theme of the statute and its practical operation and effect when applied to appellant.

The statute here challenged, although not expressly so phrased, was designed to discriminate against the solicitation by extra-State merchants of orders for the sale of

goods without the State necessarily requiring shipment into the State across State lines. The displaying of samples, specifically licensed and taxed, is but incidental to such solicitation.

In application that is in fact the result. The following analysis makes that clear:

By its terms the statute applies to persons "who shall display samples . . . for the purpose of securing orders for the retail sale of such goods . . . so displayed," and it expressly excludes all regular retail merchants in the State of North Carolina.

All residents are thereby excluded, because, by engaging in the taxed activity, they necessarily are regular retail merchants in the State. Out-of-State merchants who sell from stock on hand within the State are also excluded, because they thereby fall within the category of regular retail merchants in the State.

It therefore applies, and can apply, only to out-of-State retail merchants soliciting orders within the State to be consummated by later interstate shipment.

The license required and the tax imposed thereunder are "aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing intrastate sales."

McGoldrick v. Berwind-White Co., *supra*, at p. 55.

Their *raison d'être* is thus expressed in *Robbins v. Shelby Taxing District*, *supra* (at p. 498):

"It would not be difficult, however, to show that the tax authorized by the State of Tennessee in the present case is discriminative against the merchants and manufacturers of other states. They can only sell their goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers of Memphis, having regular li-

censed houses of business there, have no occasion for such agents, and, if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a state can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it."

The animus of the Act was described by the South Carolina Court in *State v. Yetter*, *supra* (at p. 5) as follows:

"It is true that the defendant's principal does not have to come into this State to transact business and the clear intent of this Act is to discourage, to say the least, his doing so; * * *"

The Court below took the position that the tax was designed "to remove a discrimination previously existing against regular, taxed, retail merchants" (at p. 116), and to impose tax upon the commercial activity of appellant which "has heretofore escaped taxation in the State" (at p. 120). The appellee contends similarly and argues that regular retail merchants in the State are taxed under

Section 405¹⁵, Chapter 127 of the Public Laws of 1937, and are subject to other taxes, whereas "one not a regular retail merchant in North Carolina but engaging in merchandising by securing orders for the retail sale of goods, wares, or merchandise is subject only to the tax imposed by the statute under question."

That there is absolutely no warrant for that position is manifest from a careful examination of the applicable North Carolina statutes.

In the first place, regular retail merchants in the State of North Carolina are not required to apply for a license or to pay a privilege tax, in a fixed sum or otherwise, for the privilege either of displaying samples or of selling their merchandise within the State, whether such business is conducted in a hotel room, a rented house, a store or elsewhere. That is clear from an examination of Article II of the statute, which is captioned "License Taxes," and which is the only statute of the State imposing or authorizing the imposition of license taxes. Nowhere in that Article is there any provision whatsoever imposing a license tax on such regular retail merchants in the State. They are specifically excluded from the application of the subsection of that Article here involved.

¹⁵ In his Statement Opposing Jurisdiction (at p. 5) the Attorney General argues inferentially that the tax under Section 405 is imposed only on regular retail merchants in the State, and in support of his contention he refers to the definition of the term "retail merchant" contained in Section 404. Those sections are part of Article V, the "Sales Tax Article" of the statute, and their application is limited to "the purposes of this article." The definition of the term "retail merchant" for the purposes of the Sales Tax Article has no bearing whatsoever upon the meaning of the words "regular retail merchant in the State of North Carolina" used in the subsection of the License Tax Article here involved. If appellant should effect intrastate sales at its exhibits and make intrastate deliveries, it would be subject to the provisions of the Sales Tax Article even though, for the purposes of the tax here involved, it should not be considered as a "regular retail merchant in the State of North Carolina."

In the second place, regular retail merchants in the State of North Carolina are not actually taxed under Section 405. The sales tax is in effect a tax upon the sale and not upon the retail merchant. It is to be paid by the consumer.¹⁶ Moreover, the State of North Carolina has enacted a "compensation use tax"¹⁷ at the same rate as the sales tax on the storage, use or consumption in the State of tangible personal property purchased from a retailer within or without the State for such storage, use or consumption; and under Section 806 an extra-State retailer may be authorized to collect and pay such tax; so that, in any event, the State will collect the tax on the sale.

In the third place, appellant and other extra-State merchants would, if they had samples or other property in the State on the assessment date, be subject to property tax just as is a regular retail merchant in the State of North Carolina, irrespective of whether or not such property was there solely for the purpose of soliciting sales in interstate commerce.¹⁸

Finally, appellant and other extra-State merchants are subject to the fixed-sum license tax here involved and, if an intrastate sale is effected and merchandise is delivered from the stock on display, they may also be subject to each and every other type of tax payable by any retail merchant in North Carolina, namely:

Sales tax—required by law to be passed on to the consumer;

Property tax—if the property is on hand on the assessment date;

¹⁶ Section 401 expressly provides that "it is the purpose and intent of this article that the tax levied herein on retail sales shall be added to the sales price of merchandise and thereby be passed on to the consumer instead of being absorbed by the merchant"; and it prohibits under penalty of a misdemeanor the advertising by any retail merchant of an offer to absorb the tax, or that the tax is not considered as an element in the price to the consumer.

¹⁷ Art. IX of Ch. 158, P. L. 1939.

¹⁸ See §186 of the statute, Appendix, at p. 65, *infra*.

Income tax¹⁹—payable in any event on net income earned within the State, e. g., net rents from real property owned there;

Corporate entrance fees²⁰ and annual franchise tax²¹—which the State could and undoubtedly would demand if intrastate business were thus carried on and if, as is the case with appellant, a corporate entity is involved.

It must be borne in mind that appellant is in any event subject to the same or similar taxes in the State of New York, under the laws of which it was organized and where it has its principal place of business.

The argument that the intent of the statute is to equalize and not to discriminate is therefore a snare and a delusion. As above shown, if appellant actually made some sales at its displays in North Carolina (instead of merely exhibiting samples), it would be doing business in North Carolina and therefore subject to all taxes payable by local merchants. And *additionally* it might be obliged to pay the license tax here involved if it were still deemed not to be "a regular retail merchant in the State of North Carolina."

Revenue may be the excuse; discrimination is the essence.

The statute not only imposes a State license tax of \$250., but it also authorizes counties, cities and towns each to impose a license tax in like sum.

"So, too, what the State may do directly it may authorize its municipalities to do, and if, under legislative sanction, each of the large towns in the State of North Carolina saw fit to adopt a similar license tax, the consequence would be, not a simple interference with interstate commerce, but a practical destruction of one important branch of it."

Norfolk & West. Ry. Co. v. Sims, supra, at pp. 446-447.

¹⁹ Art. IV of Ch. 127, P. L. 1937.

²⁰ North Carolina Code of 1935, as amended, §1181.

²¹ Art. III of Ch. 127, P. L. 1937.

That is precisely the situation here. There has been exacted from appellant not merely the State privilege tax of \$250., but also a like sum by each county and a like sum by each city in the State in which it has conducted its exhibits. The aggregate of the taxes thus paid by appellant since the decision below was rendered (June 16, 1939) has reached the staggeringly burdensome sum of \$4,975.

The taxing Act in the *Robbins* case did not on its face discriminate against out-of-State sellers. The decision stands for the proposition that the court will look beyond the face of the Act in order to determine whether the tax will place interstate commerce at a competitive disadvantage.

Our argument may best be phrased in the language of Mr. Justice Stone in *McGoldrick v. Berwind-White Co.*, *supra* (at p. 48):

"Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce."

And again in *Gwin, etc., Inc. v. Henneford*, *supra* (at p. 438):

"But it is enough for present purposes that under the commerce clause, in the absence of Congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce * * *"

In *South Carolina Highway Dept. v. Barnwell Bros.*, *supra*, the Court held (at pp. 185-186):

"The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state. *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 498; *Caldwell v. North Carolina*, 187 U. S. 622, 626. It was to end these practices that the commerce clause was adopted. (Citing cases.)"

To the same effect see:

Southern Pacific Co. v. Gallagher, *supra*, at p. 178.

A fixed-sum tax, substantial in amount, upon temporary displays in hotel rooms normally used for very limited periods of time, which is based upon neither the value of the merchandise displayed nor the volume of business done and is exacted only from others than "regular retail merchants in the State," is a disingenuous and flagrant means of discriminating against competitive interstate commerce with the view to its suppression.

4. Appellant's activities in North Carolina were confined exclusively to soliciting orders for the sale of goods in another State which contemplated and necessarily required interstate shipment for their fulfillment. They constituted an integral part of interstate commerce, and not a local or intrastate act separable therefrom properly subject to taxation by North Carolina.

Solicitation of orders for interstate sales is part of the commerce itself. It is not preliminary to or separable from such commerce. It does not constitute engaging in intrastate business.

Robbins v. Shelby Taxing District, supra, at p. 497;
Brennan v. Titusville, supra, at p. 298;
Sonneborn Bros. v. Cureton, 262 U. S. 506, 515.

The license is required and tax is imposed by the statute, not on the displaying of samples *per se*, but on the privilege of so displaying such samples "for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed."

It is conceded that the orders solicited by appellant were solely for interstate sales. The displaying of the samples was but the first step taken in furtherance thereof; it was but a means of exhibiting to prospective customers the kind and quality of appellant's goods to induce them to give orders therefor; it was as indispensable to the consummation of the interstate transaction as was the transportation of the merchandise across State lines.

This was the conclusion of the courts of co-ordinate jurisdiction in the related cases in two sister States.

State of Louisiana v. Best & Co., supra, at p. 927;
State v. Yetter, supra.

In the latter case the Court held (at p. 5):

"Each element of the definition of interstate commerce is present in this transaction and as I view it, each step is a necessary link in the chain. * * * Each act done by this defendant was a related and necessary step in the consummation of a transaction in interstate commerce."

The Court below reaches the remarkable conclusion that "the display use of hotel rooms and temporarily rented property here taxed is not a usual, necessary, or essential part of a commercial, retail business," and that "it is a preliminary and incidental activity which * * * may or may not transpire prior to the beginning of the flow of events which constitute the movement of goods in interstate commerce" (at p. 117).

Compare the admonition of this Court in *Brennan v. Titusville, supra* (at p. 298):

"It is true, also, that the tax imposed is for selling in a particular manner, *but a regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at a dwelling-house, is surely a regulation of commerce.*" (Italics ours.)

This is of the essence.

Under the rule in the *Brennan* case above quoted, the challenged statute must fall. The tenuous distinction drawn by the Court below does not remove from it the stamp of unconstitutionality. Whether the statute seeks to regulate merely the displaying of samples, or whether it seeks to regulate the display use of hotel rooms and temporarily rented or occupied houses, as it is construed by the Court below, is immaterial. In either event, as conceded by the Court, there must be present "the purpose of securing orders for retail sale of goods, etc." (at p. 116). Both are condemned by the holding above set forth.

This Court has repeatedly held that soliciting orders for the purpose of negotiating interstate sales is not local activity, whether carried on by house to house canvassing, or in a store, office or house.²²

The statute here involved covers displays in homes, and additionally in hotel rooms. The difference is in detail and not in substance; it does not convert the activity into a local one. (See *State of Louisiana v. Best & Co., supra*, at p. 925.)

The Court below failed to recognize the basic rule that interstate commerce embraces more than an interstate shipment. It holds that "the tax in no way hampers the

²² *Stockard v. Morgan, supra* (office); *Rearick v. Pennsylvania, supra* (house to house canvassing); *Crutcher v. Kentucky, supra* (store); *Crenshaw v. Arkansas, supra* (house to house canvassing, under a division superintendent located in the State); *Davis v. Virginia, supra* (house to house canvassing); *Real Silk Mills v. Portland, supra* (house to house canvassing).

movement of the samples, goods, etc., or of the merchandise sold, in interstate commerce" (at p. 117).

The prohibition against the imposition of burdens upon interstate commerce extends to the means and instrumentalities by which such commerce is carried on.

That principle has time and again been recognized by this Court in cases involving all types and forms of attempted State regulation and taxation, e. g.:

Privilege taxes measured by gross receipts:

Gwin, etc., Inc. v. Henneford, supra, at p. 437;
Puget Sound Co. v. Tax Commission, 302 U. S. 90;
Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 295-296;

State franchise and excise taxes measured by an apportioned percentage of capital stock or corporate excess:

Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, 153;
Alpha Cement Co. v. Massachusetts, 268 U. S. 203, 217, 218;
Ozark Pipe Line v. Monier, 266 U. S. 555, 562-563, 565;

Requiring a foreign corporation to qualify or file statements or denying to it the right to sue:

International Text Book Co. v. Pigg, 217 U. S. 91, 107, 112;
Dahnke-Walker Co. v. Bondurant, 257 U. S. 282, 290-291;
Furst v. Brewster, 282 U. S. 493, 497-498;

Sales tax when applied to gasoline consumed in interstate transportation:

Helson & Randolph v. Kentucky, supra, at p. 250;

Fixed-sum license taxes on railroad and steamship agencies engaged solely in soliciting or aiding interstate or foreign traffic:

McCall v. California, 136 U. S. 104, 111;
Texas Transportation & Terminal Co. v. New Orleans, *supra*, at pp. 156-157;

Fixed-sum license taxes of the type involved in the case at bar:

See cases cited at pp. 17-18, *supra*.

See also:

Gibbons v. Ogden, 9 Wheat. 1, 189-196;
Swift & Co. v. United States, 196 U. S. 375, 398, 399;
Heyman v. Hays, 236 U. S. 178, 184, 185-186;
Weeks v. United States, 245 U. S. 618;
Stafford v. Wallace, 258 U. S. 495, 518;
Binderup v. Pathe Exchange, 263 U. S. 291, 309;
Federal Trade Commission v. Pacific Paper Assoc.,
 273 U. S. 52, 64;
Foster Packing Co. v. Haydel, 278 U. S. 1, 10.

In the *Gwin* case, *supra*, the question was whether interstate commerce was burdened by a Washington tax, measured by the gross receipts of the appellant therein from its business of marketing fruit shipped from Washington to the places of sale in various States and in foreign countries. The Supreme Court of Washington held that the shipment of fruit from the State of origin to points outside and its sale there involved interstate commerce, but that the activities in Washington in promoting the commerce were a local business subject to State taxation. In reversing this contention this Court held (at p. 437):

"We need not stop to consider which, if any, of appellant's activities in carrying on its business are in themselves transportation of the fruit in interstate

or foreign commerce. For the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise in that commerce. Such services are within the protection of the commerce clause, *Robbins v. Shelby County Taxing District*, 120 U. S. 489; *Caldwell v. North Carolina*, 187 U. S. 622; *Real Silk Mills v. Portland*, 268 U. S. 325; * * *."

The principal cases relied upon by appellant are cited with approval in *Delamater v. South Dakota*, 205 U. S. 93, a case which involved the constitutionality of a South Dakota statute imposing a license tax on traveling liquor salesmen, which was enacted pursuant to the provisions of a federal statute, known as the Wilson Act. The latter statute granted to the States the power to regulate interstate commerce in intoxicating liquors. Although this Court sustained the validity of the South Dakota law solely because of the provisions of the Wilson Act, the following dictum from the opinion is noteworthy:

"Of course if the owner of the liquor in another State had a right to ship the same into South Dakota as an article of interstate commerce, and, as such, there sell the same in the original packages, irrespective of the laws of South Dakota, it would follow that the right to carry on the business of soliciting in South Dakota was an incident to the right to ship and sell, which could not be burdened without directly affecting interstate commerce." (at pp. 100-101).

Obviously a fixed-sum State privilege tax, especially when multiplied by a number of county and city exactions in like amount, serves to prohibit the extra-State merchant from utilizing his most effective method of obtaining a market. To carry on interstate commerce is not a franchise or privilege granted by the State, which has not the right either to dictate to the extra-State merchant the manner in which he may solicit orders for interstate sales, or to require him to forego a legitimate method of transacting his business. Where, as here, police power is not involved,

it is a right to which he is entitled, subject only to regulation by the Congress.

Crutcher v. Kentucky, *supra*, at p. 57;

International Text Book Co. v. Pigg, *supra*, at pp. 109-110;

Oklahoma v. Kansas Nat. Gas Co., 221 U. S. 229, 260.

The fine-spun distinctions by which the Court below seeks to split appellant's activities into two parts, each independent of the other, one local and one interstate, is directly at variance with the basic concept of interstate commerce. In the language of Mr. Justice Holmes: "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."²³ "What is commerce among the States is a question depending upon broader considerations than the existence of a technically binding contract, or the time and place where the title passed. . . . The offer was a part of the interstate bargain . . ."²⁴; ". . . the furnishing of the opportunity was a part of the interstate transaction. From the point of view of commerce the business was one affair."²⁵

5. A State may not require a license as a condition precedent to the pursuing of activities in interstate commerce.

People v. Horton Motor Lines, 281 N. Y. 196.

The defendant in that case, a North Carolina corporation, was an interstate motor carrier. In the course of its operations it employed two kinds of motor trucks, the tractor-trailer type used for long hauls between fixed termini, and smaller trucks to ply between its terminal in New York City and the customer's door to pick up or

²³ *Swift & Company v. United States*, *supra*, at p. 398.

²⁴ *Dozier v. Alabama*, *supra*, at p. 128.

²⁵ *Davis v. Virginia*, *supra*, at p. 699.

deliver the freight. The large trucks traveled over "regular routes," while the smaller vehicles were used for "irregular routes." The smaller trucks were also employed between the terminal and other carriers to transfer freight passing through New York City. The defendant was convicted in the court of first instance of violating the New York City Public Cart Ordinance, which required public cartmen to take out a license and to pay a fee therefor. The conviction was based upon a pick-up and delivery service rendered by one of the smaller trucks on the "irregular route," which the intermediate appellate court held to precede or to follow the interstate shipment, and to be separate and distinct therefrom.

It is interesting to note in passing that not only was the reasoning of the intermediate appellate court apposite to the reasoning of the Court below herein, but also that there was involved in that case a New York ordinance sought to be applied to a North Carolina corporation, whereas in the case at bar a North Carolina license statute is sought to be applied to a New York corporation.

The New York Court of Appeals reversed the conviction and held (at pp. 203-204) as follows:

"It is clear that whatever may be the limits of a State's power to tax property or activities related to interstate commerce, the State may not require a license as a condition precedent to the pursuing of activities in interstate commerce. (Citations.) The ordinance in question is not a tax measure, but is a comprehensive scheme to license the calling of public cartmen. Even if the ordinance were designed solely as a revenue measure, it is doubtful whether it could apply to defendant's smaller trucks. (Citation.)

The ordinance in the case at bar is not one of the types of taxation or police regulation by the states or municipalities which are permitted under principles well defined. It is not in the nature of a property tax (citation); nor is it regulation which involves a proper exercise of the police power (citation); nor is it a regulation of an intrastate activity, which may be separable from interstate commerce. • • •

The ordinance in the case at bar does not levy a tax upon an intrastate activity closely related to interstate commerce, but attempts to tax an integral portion of interstate commerce itself."

The rationale of the New York Court is in striking contrast with the unorthodox approach to the problem by the Court below which, in an effort to sustain the validity of the statute, found it necessary to construe the Commerce Clause of the Federal Constitution *de novo* and without regard to its well-rooted historic background.

We submit that the Commerce Clause, by its own force, prohibits discriminatory regulation of interstate commerce, whatever may be its form or method, and that the challenged statute is a transparent attempt at such regulation.

II

The characterization of the tax as a "use tax" by the Court below does not save it from constitutional offense.

1. The tax challenged is not a "use tax".

In the attempt to save the statute from repugnancy to the Commerce Clause of the Federal Constitution, the prevailing opinion of the Court below advances the theory that the tax thereby levied is a "use tax" imposed "upon the use of North Carolina real estate" (at p. 117).

With this view three of the six participating Justices vigorously dissent on rehearing, and they condemn such forced construction as imputing to the statute a meaning not warranted by its terms, which cannot save it from constitutional offense.

In considering the corresponding and virtually identical Louisiana statute, the Supreme Court of that State likewise finds "no merit" whatsoever in the suggestion that the tax "partakes of the nature of a use tax."²⁶

²⁶ *State of Louisiana v. Best & Company, supra*, at p. 934.

A mere reading of the statute (Appendix, at pp. 61-68, *supra*) demonstrates the fallacy of the "use tax" theory. At pp. 7-9, *supra*, there is set forth an analysis of the inconsistencies in the prevailing opinion of the Court below with particular reference to such "use tax" theory, in which material excerpts from the statute are quoted in refutation thereof.

Suffice it to say here that:

The statute nowhere employs the words "use tax", or any words of similar import;

Contrariwise, the Article of the statute is captioned "License Taxes", and the taxes imposed by its several provisions, including the subsection here involved, all are specifically denominated license taxes;

The particular subsection here challenged unequivocally shows on its face that the license tax thereby imposed is "for the privilege of displaying . . . samples, goods, wares, or merchandise" "for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed"; and, in practical operation when applied to appellant, it affects, and can affect, only the transaction of interstate commerce;

That particular subsection is a part of a section captioned "Peddlers", each of the several subdivisions of which imposes a license or privilege tax on a particular type of peddler or drummer. (Cf. *Caldwell v. North Carolina*, *supra*.)

Upon the principle of *noscitur a sociis* all parts of the same section—and additionally all parts of the same Article—must be read together. The particular tax here challenged may not be isolated from the others and otherwise denominated. They together form an integrated taxing unit, imposing fixed-sum license taxes, which does not harmonize with the theory that the incidence of the tax

here challenged is on "the use of North Carolina real estate." Such interpretation is obviously inconsistent and at direct variance with the legislative intent.

The State of North Carolina now has a law imposing a true use tax within the correct and accepted meaning of that expression as defined by judicial decisions. It is known as the Compensation Use Tax Article.²⁷ It is in no respect similar to the statute here involved. It levies and imposes an excise tax on the storage, use or consumption in the State of tangible personal property purchased from a retailer within or without the State for storage, use or consumption in the State, at a rate equal in amount to the rate of tax under the sales tax law. The word "use" is therein defined to mean and include "the exercise of any right or power over tangible personal property incident to the ownership of that property."

A "use tax" is predicated upon the ownership of the property as in the Compensation Use Tax Law, and not on the temporary occupancy of a local hotel room, as contended by the Court below in construing the challenged statute.

It is a property tax upon the privilege of use, which is one of the attributes of ownership.

Henneford v. Silas Mason Co., 300 U. S. 577.

Mr. Justice Cardozo, in speaking for this Court in that case, said (at p. 582):

"The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.

Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination. (Citations.) * * * The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership."

²⁷ Art. IX of Ch. 158, P. L. 1939.

At p. 586, he points out the very distinction here pertinent, viz.:

"But a tax upon use, or, what is equivalent for present purposes, a tax upon property after importation is over, is not a clog upon the process of importation at all * * *."

The *Henneford* decision cautions against the very thing done by the Court below in using the self-evident misnomer "use tax" in connection with the tax here involved:

"Catch words and labels * * * are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard" (at p. 586.)

The decision in *Southern Pacific Co. v. Gallagher, supra*, which is the latest expression of this Court on the subject of use taxes, demonstrates that there is no conflict whatever between the recent decisions on that subject and the principal authorities relied upon by appellant herein, in which fixed-sum license taxes imposed upon the privilege of soliciting orders for the purchase of goods to be shipped interstate have been held repugnant to the Commerce Clause. It cites with approval the precedents on the latter subject.²⁸

As we read *Robbins v. Shelby Taxing District, supra*, it appears to us to be the forerunner and historical precedent—if not the grandfather—of the recent use tax decisions (note the significant language therein, at p. 497²⁹).

²⁸ See pp. 25-26, *supra*.

²⁹ "As soon as the goods are in the state and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, * * *. When goods are sent from one state to another for sale, or, in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are. (Citations.) But to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself."

In the case at bar no property tax whatsoever is involved. The display use of samples, which concededly did not become part of the common mass of property within the State, was, in the language of Mr. Justice Cardozo, "so closely connected with delivery as to be in substance a part thereof."³⁰

The instant tax is not and cannot properly be characterized as a "use tax", since it is a tax upon the interstate commerce itself, to wit, upon the privilege of soliciting orders, rather than upon the privilege of use.³¹

2. Even if the tax exacted is a use tax, it is nevertheless a discriminatory and prohibited exaction.

The dissenting opinion of the Court below on rehearing pithily states our argument as follows:

"Nor can the construction heretofore given to the statute save it from constitutional offense. If the tax imposed be a 'use tax', it is discriminatory." (217 N. C. 134, 136.)

The gist of the decision in *Henneford v. Silas Mason Co.*, *supra*, is that "the tax upon the use after the property is at rest is not so measured or conditioned as to hamper the transactions of interstate commerce or discriminate against them."

In the case at bar the very purpose of the tax is to hamper transactions of interstate commerce and discriminate against them. The point of time when the immunity from State taxation ceases has not been reached while a merchant is still actively engaged in soliciting orders for the sale of goods to be shipped interstate.

Cf. *Brown v. Maryland*, 12 Wheat. 419, 441.

³⁰ See 300 U. S., at p. 583.

³¹ Cf. following excerpt from the opinion of the Court below: "It is a use tax, levied in the State of North Carolina upon profitable and commercial activity which has otherwise escaped taxation * * * (at p. 116).

The tax is concededly not imposed on any use of the hotel room other than the display use thereof for the sole purpose of securing orders for the retail sale of goods. If a discriminatory burden were not intended, the purpose of the use of such property would be entirely immaterial, and the use thereof by regular retail merchants in the State of North Carolina would not be exempted. If the tax were a true use tax, it would not be in a fixed sum, imposed without relation to the amount or value of the property used, the duration of the period of use, or the number of rooms or parcels of property used.

Limited as it is in practical operation to extra-State merchants temporarily using hotel rooms and rented houses for the display of samples for the sole purpose of securing orders for the sale of goods to be shipped interstate, the tax is a discriminatory and prohibited exaction (see Point I, subdiv. 3, *supra*), no matter how it may be characterized by the Court below.

3. This Court is not bound by the form a statute bears or how it is characterized by the State Court. It should determine the true nature of the tax by ascertaining its operation and effect.

In his Statement Opposing Jurisdiction, the Attorney General significantly sought to avoid a consideration of the appeal on its merits by invoking the familiar rule (here inapplicable) that the construction placed upon a State statute by the highest Court of the State is binding upon this Court.

In so doing, he ignored the equally familiar rule that this Court must determine the questions raised under the Federal Constitution upon its own judgment of the actual operation and effect of the tax, irrespective of the label it bears or the manner in which it is construed by the State court.

Kansas City Ry. v. Kansas, 240 U. S. 227, 231;
Crew Levick Co. v. Pennsylvania, *supra*, at p. 294;
International Paper Co. v. Massachusetts, 246 U. S.
 135, 142;
Air-Way Corp. v. Day, 266 U. S. 71, 82;
Carpenter v. Shaw, 280 U. S. 363, 367;
Near v. Minnesota, 283 U. S. 697, 708;
Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249,
 259;
Schuylkill Trust Co. v. Penna., 296 U. S. 113, 119.

This Court has specifically held to that effect in two prior cases carried up from the Supreme Court of the State of North Carolina, which, as in the case at bar, involved fixed-sum license taxes.

Caldwell v. North Carolina, *supra*, at p. 624;
Norfolk & West. Ry. Co. v. Sims, *supra*, at p. 447.

In the latter case the Court said:

"• • • it is evident that the state courts could not give it a construction which would operate as an interference with interstate commerce, and that upon this question the opinion of this court is controlling."

Similar rulings of this Court have been made in other cases relating to fixed-sum license tax statutes, e. g.:

"The mere calling the business of a drummer a privilege cannot make it so."

Robbins v. Shelby Taxing District, *supra*, at p. 496.

"Even if those declarations had been the reverse, and the license in terms been declared to be exacted as a police regulation, that would not conclude this question, for whatever may be the reason given to justify, or the power invoked to sustain the act of the State, if that act is one which trenches directly upon that which is within the exclusive jurisdiction of the national government, it cannot be sustained."

Brennan v. Titusville, *supra*, at p. 299.

"The name does not alter the character of the transaction, nor prevent the tax thus laid from being a tax upon interstate commerce."

Stockard v. Morgan, supra, at p. 36.

"We must look, however, to the substance of things, not the names by which they are labelled, particularly in dealing with rights created and conserved by the Federal Constitution and finding their ultimate protection in the decisions of this court."

Crenshaw v. Arkansas, supra, at p. 400.

The Attorney General further argued (in his Statement Opposing Jurisdiction) that the construction of the State statute by the highest court of North Carolina precluded this Court from considering the federal questions which are, as the Court below conceded, the only questions involved.

Reduced to its simplest terms, the gist of his argument is that no question is open to review by this Court, because the Court below has decided that the statute here involved does not impose an undue burden upon commerce between the States. If this contention were followed to its logical conclusion, no statute sustained as constitutional by a State court would ever be available for review by this Court.

The question whether a State law or a tax imposed thereunder deprives a party of rights secured by the Federal Constitution depends not upon the form of the act, nor upon how it is construed or characterized by the State court, but upon its practical operation and effect.

American Mfg. Co. v. St. Louis, 250 U. S. 459; 462-463.

The Attorney General's argument is succinctly answered in *Wagner v. City of Covington*, 251 U. S. 95, at p. 102:

"The state court could not render valid, by mis-describing it, a tax law which in substance and effect was repugnant to the Federal Constitution; * * *."

See also:

Macallen Co. v. Massachusetts, 279 U. S. 620, 626;
Educational Films Corp. v. Ward, 282 U. S. 379,
 387;

Lawrence v. State Tax Comm., 286 U. S. 276, 280.

The ruling below that the display of samples in a local hotel room constituted intrastate business in North Carolina does not foreclose this Court from considering and determining for itself whether the appellant's activities in that State actually constituted interstate commerce and whether the State law as applied to the appellant was repugnant to the Commerce Clause.

Kansas City Steel Co. v. Arkansas, 269 U. S. 148,
 150;

Davis v. Virginia, *supra*, at pp. 698-699.

III

The authorities relied upon in the prevailing opinion of the Court below do not support the conclusion there reached and are inapplicable.

Stafford v. Wallace, *supra*, *Chicago Board of Trade v. Olsen*, 262 U. S. 1, and *Welton v. Missouri*, *supra*, are cited for a proposition which appellant does not dispute and which is entirely inapplicable to the case at bar, namely: that this Court will not substitute its judgment for legislation enacted by Congress regulating interstate commerce, unless the relation thereto and its effects thereon are clearly non-existent. It is stated *a fortiori* that this Court will presumably not substitute its judgment for that of a State legislature as to its taxing power unless the statute clearly and unduly burdens the freedom of interstate commerce.

That argument is utterly beside the point. Appellant contends that under our theory of government every license and tax statute affecting interstate commerce must be able to pass the test of constitutionality, and the authorities cited do not purport to gainsay that principle.

The difference between the statute in the case at bar and those in the *Stafford* and *Chicago Board of Trade* cases is that in the latter they were scrutinized to determine validity and found not wanting, whereas the statute here involved cannot withstand such scrutiny.

The *Welton* case involved a license statute which was held invalid as infringing the Commerce Clause.

In support of its conclusion that appellant's activity in North Carolina was merely preliminary, incidental, and transpired prior to the interstate movement of goods, the opinion cites the following cases, each of which is readily distinguishable, namely:

Carter v. Carter Coal Co., 298 U. S. 238, is cited for the rule that production has been held not to constitute interstate commerce, which the Court below deems analogous to appellant's activities in North Carolina. That case involved the validity of the Bituminous Coal Conservation Act of 1935, a federal statute. The distinction between production, which was held to be manufacturing and therefore intrastate, and disposal of the manufactured product, which was held to be interstate, is forcibly brought out in the opinion of this Court (at pp. 303-304) as follows:

"Extraction of coal from the mines is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by force of these activities, but by negotiations, agreements, and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence. *Commerce disposes of it.*" (Italics ours.)

And in the vigorous dissenting opinion by Mr. Justice Cardozo, concurred in by Justices Brandeis and Stone, it is stated that production also constitutes part of inter-

state commerce, and interstate transactions should be considered as a whole and their components should not be broken into separate parts.

Moreover, in the *Labor Board Cases*, 301 U. S. 1, 49 and 58, and in *Edison Co. v. Labor Board*, 305 U. S. 197, which were decided subsequent to the *Carter* case, the local production activities of industrial concerns and utilities are held to constitute interstate commerce.

Appellant's activities in North Carolina constituted an integral part of the interstate transaction and were essential to the negotiation and disposal of the merchandise.

Coe v. Errol, 116 U. S. 517, and the authorities based thereon, viz., *Kidd v. Pearson*, 128 U. S. 1, *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, and *Champlin Rfg. Co. v. Commission*, 286 U. S. 210, are cited for the rule, undisputed and here inapplicable, that the mere fact that local products are ultimately intended to become subjects of interstate commerce does not suffice to stamp them with immunities attaching to interstate commerce. The basic question in each of the four cases is whether mere intent to export from the State, coupled with partial preparation therefor, exempts the goods on hand in the State from regulation or taxation.

In the *Coe* case such goods on hand on the assessment date are held to be subject to general property taxation, precisely as is other property constituting part of the general mass of property in the State, and that the taxable status continues until, but not after, interstate transportation commences. A different type of tax, but the same principle, is involved in the *Heisler* case. These two cases are cited in *McGoldrick v. Berwind-White Co.*, *supra*, (at p. 47) to stand for the proposition that non-discriminatory taxation of property, shipped interstate, before its movement begins, is not a forbidden regulation.

The *Kidd* case involves the exercise by a State of its police power in prohibiting the manufacture of intoxicating liquors within its boundaries, which this Court held

not to be overthrown because the manufacturer intends to export the liquors after their manufacture. The *Champlin Rfg. Co.* case held that the mere intention to export oil produced within a State does not prevent the State from enacting and applying an oil conservation regulation.

The case at bar does not relate to any product of North Carolina intended to be exported therefrom and the challenged tax is not a tax on property.

Chassaniol v. Greenwood, 291 U. S. 584, involved the validity of a municipal ordinance imposing an occupation tax on persons engaged in the business of buying and selling cotton for themselves. The City of Greenwood is a concentration point for long staple cotton and an active market for its purchase and sale. Cotton is grown and ginned in Mississippi and sent to Greenwood, where it is compressed and sold through receipts issued by local warehouses. The cotton stopped and came to a complete rest in the City of Greenwood. Chassaniol was engaged in the business of buying and selling cotton for himself; he became the absolute owner and made the profit or bore the loss on the resale. This Court held that as to him the tax was valid and that persons engaged in purely local businesses, such as ginning and warehousing, were properly and lawfully subject to local occupation taxes, just as the property owned by them was subject to general property taxation. The gist of the decision is that an excise for the warehousing of merchandise preparatory to its interstate shipment is not precluded.

Appellant herein is engaged in business and its goods are situated in the City of New York, not in the State of North Carolina. The *Chassaniol* case is authority for the imposition by the City or State of New York of a tax on appellant with respect to its occupation and on its property, prior to its being shipped outside the State of New York. It is not authority for the imposition by the State of North Carolina of a tax on appellant for displaying samples of its goods in order to induce the making of a sale necessarily requiring interstate shipment into North Carolina from New York.

In *Veazie v. Moore*, 14 How. 567, the question was whether a law of the State of Maine, granting the exclusive navigation of the Penobscot River which is entirely within the State of Maine from source to mouth, violated the Commerce Clause. It was held that the statute did not in any way relate to interstate or foreign commerce. That case obviously has no bearing.

Western Live Stock v. Bureau of Revenue, 303 U. S. 250, is relied upon to support the holding that the use of North Carolina real estate for the purpose of displaying samples is only a preliminary activity separate and distinct from interstate commerce, although commercially intended to result in such commerce by stimulating the desire for the goods displayed. The *Western Live Stock* case involved the validity of a New Mexico privilege tax measured by the amount received from the sale of advertising space by persons engaged in the business of publishing newspapers and magazines. The appellant therein published a journal which was wholly prepared, edited and distributed within the State of New Mexico, where its only office and place of business was located. It was contended that the tax was invalid because some of the advertising was obtained through solicitation in other States. This Court held the New Mexico tax valid as an excise conditioned upon the carrying on of a purely local business "separate and distinct from the transportation and intercourse which is interstate commerce." It pointed out that the tax was one which could not be repeated by any other State because the business was not conducted elsewhere than in New Mexico.

The tax there involved was substantially similar to taxes which the appellant is required to pay in its home State of New York, notwithstanding that it engages in interstate business with customers in other States.

The Court below is attempting to reverse the reasoning of the *Western Live Stock* case and thereby to impose cumulative burdens on appellant, which this Court held to be the vice of the forms of taxation uniformly invalidated by it (at pp. 255-256).

Postal Tel.-Cable Co. v. Richmond, 249 U. S. 252, is cited for the proposition that even interstate business must pay its way, with which appellant takes no issue. In that case there were imposed on telegraph companies both an annual license tax for the privilege of doing business in the City of Richmond and an annual fee for each telegraph pole maintained or used in the streets of the City. The Telegraph Company actually transacted both intrastate and interstate business, and permanently maintained poles and equipment on the streets. This Court upheld the constitutionality of the statute, and pointed out that the local business purporting to be taxed was so substantial in amount that it did not appear that the tax was an attempt to tax interstate commerce. The evidence established that the poles and wires in the streets required official inspection and supervision, and that the tax was not unreasonable for the municipal service rendered. That case is obviously inapplicable here where only interstate commerce is involved, and it is not, nor can it be, contended that the substantial amount of tax imposed by or under the authority of the challenged statute is merely compensatory.

Coverdale v. Pipe Line Co., 303 U. S. 604, involved the validity of a Louisiana statute imposing a privilege tax on the production of mechanical power as applied to an engine used to supply such power to a compressor, which increased the pressure of natural gas and thus permitted it to be transported to purchasers in other States. The appellee therein was engaged in the business of producing, buying, transporting and selling natural gas in Louisiana, Arkansas and Texas, which gas was obtained from its fields in Louisiana and transmitted through a pipe line to other States. The gas could not be transmitted for the required distance in sufficient amounts except at a pressure higher than that which came from the wells. There were accordingly permanently maintained in Louisiana ten pumps connected with ten large gas-burning engines, as well as two gas-burning engines for general power service in the State.

Louisiana laid a tax on the privilege of operating these twelve gas engines. It was held that the Pipe Line Company was carrying on a local business in maintaining the gas engines, and that it was therefore subject to the privilege tax thereon imposed by the State.

In the *Coverdale* case the tax was imposed for carrying on a purely local business, involving permanent maintenance in the State of very substantial machinery and equipment for the manufacture and production of power. The tax in that case is readily distinguishable from the tax here challenged. The latter is aimed entirely and directly at an integral portion of interstate-commerce itself.

None of the foregoing citations is authority for the licensing and taxation by a State of the act of engaging in interstate commerce, or justifies the flagrant discrimination herein sought to be effected. At most, they hold that taxation of a local intrastate business or occupation, which is separate and distinct from the transportation or intercourse which is interstate commerce, is not repugnant to the Commerce Clause merely because interstate transactions are thereby induced or occasioned; and that a State may tax goods which form a part of its general mass of property permanently located within its boundaries even though they may be used in interstate commerce.

Virtually all these precedents were commented on by this Court in *McGoldrick v. Berwind-White Co.*, *supra*, which, nevertheless, found them not to be inconsistent with the long line of decisions of this Court following *Robbins v. Shelby Taxing District*, *supra*.

The remaining decisions of this Court cited in the opinion below all relate to use taxes, or to excise taxes for the storage or withdrawal of goods for use by the consignee after the interstate journey has ended. These cases have been fully considered and shown to be inapplicable in Point II, subdv. 1, at pp. 42-46, *supra*.

IV

The license required and the tax exacted from appellant deny it the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States,

The statute under which the tax was exacted excludes from its operation regular retail merchants in the State of North Carolina. By engaging in the taxed activity, a resident of North Carolina would be a regular retail merchant in the State, and therefore every resident is necessarily exempted.

The purpose of the statute and the actual result of its application are to discriminate against extra-State merchants.⁸²

A statutory classification requiring a license and imposing a license tax on extra-State merchants for displaying samples in hotel rooms and houses rented or occupied temporarily for the purpose of securing orders for the retail sale of their goods is so whimsical, arbitrary and capricious as to deny those within such classification the equal protection of the laws, in violation of the Fourteenth Amendment, particularly where, as here, regular retail merchants are not subject to any corresponding regulation or tax.

The law on this subject is summarized in *Colgate v. Harvey*, 296 U. S. 404, at pp. 422-423, as follows:

"It is settled beyond the admissibility of further inquiry that the equal protection clause of the Fourteenth Amendment does not preclude the states from resorting to classification for the purposes of legislation. *Royster Guano Co. v. Virginia*, 253 U. S. 412,

⁸² This was established in Point I, subdiv. 3, at pp. 27-34, *supra*. See also Yount, "Constitutional Law—Privilege Tax—Temporary Use of Rooms for Solicitation of Sales in Interstate Commerce," 18 North Carolina L. Rev. 48.

415. And 'the power of the state to classify for purposes of taxation is of wide range and flexibility * * *,' *Louisville Gas Co. v. Coleman*, 277 U. S. 32, 37. But the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, *supra*; *Air-Way Corp. v. Day*, 266 U. S. 71, 85; *Schlesinger v. Wisconsin*, 270 U. S. 230, 240. The classification, in order to avoid the constitutional prohibition, must be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones. The test to be applied in such cases as the present one is—does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation? 'Mere difference is not enough.' *Louisville Gas Co. v. Coleman*, *supra*; *Frost v. Corporation Commission*, 278 U. S. 515, 522."

See also:

Louisville Gas Co. v. Coleman, 277 U. S. 32, 38;
Southern Railway Co. v. Greene, 216 U. S. 400.

Discriminatory interference with commerce among the States falls within the constitutional prohibition.

"The act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its application. * * * The act violates the equal protection clause of the Fourteenth Amendment."

Air-Way Corp. v. Day, *supra*, at p. 85.

Appellant recognizes that the Equal Protection Clause of the Fourteenth Amendment does not limit the power of the State to make any reasonable classification of property, occupations, persons or corporations for purposes of taxation; but it submits that it forbids inequality caused by

clearly arbitrary action, especially such as is attributable to hostile discrimination against particular persons or classes.

The statute here challenged, as applied to appellant and other extra-State merchants, clearly falls within such prohibition, because it is arbitrary and discriminates hostilely against extra-State merchants soliciting orders for the sale of goods to be shipped interstate, in favor of regular retail merchants in the State of North Carolina, who are excluded from its provisions and who are not subject to any other license tax whatsoever for the privilege of conducting their businesses.

V

The tax exacted from appellant deprives it of its property without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The statute purports to exercise the taxing authority of the State over property and rights which are wholly beyond the confines of the State and not subject to its jurisdiction.

Appellant's activities constitute solely and exclusively interstate commerce³³ for the exercise of which no privilege has been or may be granted by the State, and the tax is therefore in effect a tax upon the doing of business by appellant without the State, and upon the merchandise of appellant all of which is situate outside the State.

In *Air-Way Corp. v. Day*, *supra*, this Court held (at pp. 81-82):

"In cases involving the validity of the laws of a State imposing license fees or excise taxes on corporations organized in another State, this Court has decided:

.

³³ See Point I, subdvs. 3 and 4, at pp. 27-40, *supra*.

'6. When tested, as it must be, by its substance—its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the State.' *International Paper Co. v. Massachusetts*, 246 U. S. 135, 141."

—To the same effect see:

Looney v. Crane Co., 245 U. S. 178, 188;
Alpha Cement Co. v. Massachusetts, 268 U. S. 203.

The tax exacted from appellant constitutes a taking of its property without due process of law in violation of the Fourteenth Amendment.

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of the State of North Carolina should be reversed.

Dated, October 19, 1940.

Respectfully submitted,

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APPENDIX

Statute Involved

The pertinent provisions of Chapter 127 of the State of North Carolina Public Laws of 1937 are as follows:

ARTICLE II.

SCHEDULE B.

LICENSE TAXES.

§ 100. Taxes under this article.—Taxes in this article or schedule shall be imposed as State license tax for the privilege of carrying on the business, exercising the privilege, or doing the act named, and nothing in this article shall be construed to relieve any person, firm, or corporation from the payment of the tax prescribed in this article or schedule.

• • • • •

(b) Every State license issued under this article or schedule shall be for twelve months, shall expire on the thirty-first day of May of each year, and shall be for the full amount of tax prescribed: Provided, that where the tax is levied on an annual basis and the licensee begins such business or exercises such privilege after the first day of January and prior to the thirty-first day of May of each year, then such licensee shall be required to pay one-half of the tax prescribed other than the tax prescribed to be computed and levied upon a gross receipts and/or percentage basis for the conducting of such business or the exercising of such privilege to and including the thirty-first day of May, next following. Every county, city and town license issued under this article or schedule shall be for twelve months, and shall expire on the thirty-first day of May or

thirtieth day of June of each year as the governing body of such county, city or town may determine: Provided, that where the licensee begins such business or exercises such privilege after the expiration of seven months of the current license year of such municipality, then such licensee shall be required to pay one-half of the tax prescribed other than the tax prescribed to be computed upon a gross receipts and/or percentage basis.

(c) The State license thus obtained shall be and constitute a personal privilege to conduct the business named in the State license, shall not be transferable to any other person, firm, or corporation, and shall be construed to limit the person, firm, or corporation named in the license to conducting the business and exercising the privilege named in the State license to the county and/or city and location specified in the State license, unless otherwise provided in this article or schedule:

* * * * *

(e) All State taxes imposed by this article shall be paid to the Commissioner of Revenue, or to one of his deputies; shall be due and payable on or before the first day of June of each year, and after such date shall be deemed delinquent, and subject to all the remedies available and the penalties imposed for the payment of delinquent State license and privilege taxes: Provided, that if a person, firm, or corporation begins any business or the exercise of any privilege requiring a license under this article or schedule after the thirty-first day of May and prior to the thirty-first day of the following May of any year, then such person, firm, or corporation shall apply for and obtain a State license for conducting such business or exercising any such privilege in advance, and before the beginning of such business or the exercise of such privilege; and a failure to so apply and to obtain such State license shall be and constitute a delinquent payment of the State license tax due, and such person, firm, or corporation shall be subject to

the remedies available and penalties imposed for the payment of such delinquent taxes.

[There follows an enumeration of the various businesses, privileges, etc. subject to the imposition of the license tax above referred to.]

§ 121. Peddlers.—(a) Any person, firm, or corporation who or which shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same, or actually sells or barter the same, shall be deemed a peddler, except such person, firm, or corporation who or which is a wholesale dealer, with an established warehouse in this State and selling only to merchants for resale, and shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business, and shall pay for such license the following tax:

• • • • •

(c) Any person, firm, or corporation who or which sells or offers to sell from a cart, wagon, truck, automobile, or other vehicle operated over and upon the streets and/or highways within this State any fresh fruits and/or vegetables shall be deemed a peddler within the meaning of this section and shall pay the annual license tax levied in subsection (a) of this Act with reference to the character of the vehicle employed.

• • • • •

(d) Every itinerant salesman or merchant who shall expose for sale, either on the street or in a building occupied, in whole or in part, for that purpose, any goods, wares, or merchandise, not being a regular merchant in such county, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of transacting such business, and shall pay for such license a tax of one hundred dollars (\$100.00) in each county in which he shall conduct or carry on such business.

• • • • •

*(e) Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of displaying such samples, goods, wares or merchandise, and shall pay an annual privilege tax of two hundred fifty dollars (\$250.00), which license shall entitle such person, firm, or corporation to display such samples, goods, wares, or merchandise in any county in this State.

* * * * *

(h) Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of the annual license levied by the State. * * *

No county, city, or town shall levy any license tax under this section upon the persons so exempted in this section, nor upon drummers selling by wholesale: * * *

* * * * *

§ 181. Unlawful to operate without license.—When a license tax is required by law, and whenever the General Assembly shall levy a license tax on any business, trade, employment, or profession, or for doing any act, it shall be unlawful for any person, firm, or corporation without a license to engage in such business, trade, employment, profession, or do the act; and when such tax is imposed it shall be lawful to grant a license for the business, trade, employment, or for doing the act; and no person, firm, or corporation shall be allowed the privilege of exercising any business, trade, employment, profession, or the doing of any act taxed in this schedule throughout the State under one license, except under a state-wide license.

* The tax imposed upon applicant was exacted in purported compliance with section 121 (e).

§ 182. Manner of obtaining license from the Commissioner of Revenue.—(a) Every person, firm, or corporation desiring to obtain a State license for the privilege of engaging in any business, trade, employment, profession, or of the doing of any act for which a State license is required shall, unless otherwise provided by law, make application therefor in writing to the Commissioner of Revenue, in which shall be stated the county, city, or town and the definite place therein where the business, trade, employment, or profession is to be exercised; the name and resident address of the applicant, whether the applicant is an individual, firm, or corporation; the nature of the business, trade, employment, or profession; number of years applicant has prosecuted such business, trade, employment, or profession in this State, and such other information as may be required by the Commissioner of Revenue. The application shall be accompanied by the license tax prescribed in this article.

(b) Upon receipt of the application for a State license with the tax prescribed by this article, the Commissioner of Revenue, if satisfied of its correctness, shall issue a State license to the applicant to engage in the business, trade, employment, or profession in the name of and at the place set out in the application. No license issued by the Commissioner of Revenue shall be valid or have any legal effect unless and until the tax prescribed by law has been paid, and the fact of such shall appear on the face of the license.

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§ 186. Property used in a licensed business not exempt from taxation.—A State license, issued under any of the provisions of this article, shall not be construed to exempt from other forms of taxation the property employed in such licensed business, trade, employment, or profession.

§ 187. Engaging in business without a license.—(a) All State license taxes under this article or schedule, unless

otherwise provided for, shall be due and payable annually on or before the first day of June of each year, or at the date of engaging in such business, trade, employment, and/or profession, or doing the act.

(b) If any person, firm, or corporation shall continue the business, trade, employment, or profession, or to do the act, after the expiration of a license previously issued, without obtaining a new license, he or it shall be guilty of a misdemeanor, and upon conviction shall be fined and/or imprisoned in the discretion of the court, but the fine shall not be less than twenty per cent (20%) of the tax in addition to the tax and the costs; and if such failure to apply for and obtain a new license be continued, such person, firm or corporation shall pay additional tax of five per centum (5%) of the amount of the State license tax which was due and payable on the first day of June of the current year, in addition to the State license tax imposed by this article, for each and every thirty days that such State license tax remains unpaid from the date that same was due and payable, and such additional tax shall be assessed by the Commissioner of Revenue and paid with the State license tax, and shall become a part of the State license tax. The penalties for delayed payment hereinbefore provided shall not impair the obligation to procure a license in advance or modify any of the pains and penalties for failure to do so.

The provisions of this section shall apply to taxes levied by the counties of the State under authority of this Act in the same manner and to the same extent as they apply to taxes levied by the State.

(c) If any person, firm, or corporation shall commence to exercise any privilege or to promote any business, trade, employment, or profession, or to do any act requiring a State license under this article without such State license, he or it shall be guilty of a misdemeanor, and shall be fined and/or imprisoned in the discretion of the court; and if such failure, neglect, or refusal to apply for and obtain such

State license be continued, such person, firm, or corporation shall pay an additional tax of five per centum (5%) of the amount of such State license tax which was due and payable at the commencement of the business, trade, employment, or profession, or doing the act, in addition to the State license tax imposed by this article, for each and every thirty (30) days that such State license tax remains unpaid from the date that same was due and payable, and such additional tax shall be assessed by the Commissioner of Revenue and paid with the State license tax and shall become a part of the State license tax.

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§ 189. Duties of Commissioner of Revenue.—(a) Except where otherwise provided, the Commissioner of Revenue shall be the duly authorized agent of this State for the issuing of all State licenses and the collection of all license taxes under this article, and it shall be his duty . . . to ascertain whether all persons, firms, or corporations in the various counties of the State who are taxable under the provisions of this article have applied for the State license and paid the tax thereon levied.

(b) The Commissioner of Revenue shall continually keep in his possession a sufficient supply of blank State license certificates, with corresponding sheets and duplicates consecutively numbered; shall stamp across each State license certificate that is to be good and valid in each and every county of the State the words "State-wide license," and shall stamp or imprint on each and every license certificate the words "issued by the Commissioner of Revenue."

(c) Neither the Commissioner of Revenue nor any of his deputies shall issue any duplicate license unless expressly authorized to do so by a provision of this article or schedule, and unless the original license is lost or has become so mutilated as to be illegible, and in such cases the Commissioner of Revenue is authorized to issue a duplicate certificate for which the tax is paid, and shall stamp upon its face "duplicate".

§ 190. License to be procured before beginning business.

—(a) Every person, firm, or corporation engaging in any business, trade, and/or profession, or doing any act for which a State license is required and a tax is to be paid under the provisions of this article or schedule, shall, annually in advance, on or before the first day of June of each year, or before engaging in such business, trade, and/or profession, or doing the act, apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, trade, and/or profession, or doing such act, and shall pay the tax levied therefor.

(b) Licenses shall be kept posted where business is carried on. No person, firm, or corporation shall engage in any business, trade and/or profession, or do the act for which a State license is required in this article or schedule, without having such State license posted conspicuously at the place where such business, trade, and/or profession is carried on; and if the business, trade, and/or profession is such that license cannot be so posted, then the itinerant licensee shall have such license required by this article or schedule in his actual possession at the time of carrying on such business, trade, and/or profession, or doing the act named in this article or schedule, or a duplicate thereof.

(c) Any person, firm, or corporation failing, neglecting, or refusing to have the State license required under this article or schedule posted conspicuously at the place of business for which the license was obtained, or to have the same or a duplicate thereof in actual possession if an itinerant, shall pay an additional tax of twenty-five dollars (\$25.00) for each and every separate offense, and each day's failure, neglect, or refusal shall constitute a separate offense.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. [REDACTED] 61

BEST & COMPANY, INC.

Appellant,

vs.

**A. J. MAXWELL, COMMISSIONER OF REVENUE OF THE STATE
OF NORTH CAROLINA.**

**APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH
CAROLINA.**

**STATEMENT OPPOSING JURISDICTION, MOTION
TO DISMISS AND MOTION TO STRIKE.**

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 961

BEST & COMPANY, INC.

Appellant,

vs.

**A. J. MAXWELL, COMMISSIONER OF REVENUE OF THE STATE
OF NORTH CAROLINA.**

**STATEMENT AGAINST JURISDICTION OF THE
SUPREME COURT.**

A. J. Maxwell, Commissioner of Revenue of the State of North Carolina, the defendant in the above entitled case, files herewith a statement of matters and grounds against the jurisdiction of the Supreme Court of the United States asserted by the appellant, as follows:

**I. The Nature of the Case and the Ruling of the Court
Below.**

The applicant, under this heading, quotes from the opinion of the Supreme Court of North Carolina certain excerpts which are stated as the rulings of that court.

The opinion in its entirety must be considered as the ruling of the court, rather than disconnected portions quoted by the applicant. The opinion of the Supreme Court of North Carolina in effect held that the provisions of Chapter 127, Section 121(e), of the Revenue Act of 1937 imposing a tax upon the display of samples of goods in a hotel room or temporarily occupied house for the purpose of securing orders for the retail sale of such goods by any person, firm or corporation not a regular retail merchant in the State does not impose a burden upon interstate commerce and is valid, since the tax is imposed alike upon residents and nonresidents engaged in the activity defined and is a use tax levied upon the local use of hotel rooms and temporarily occupied houses for the purpose of promoting retail sales by persons not otherwise taxed as retail merchants, and since the activity taxed is a preliminary and nonessential activity transpiring prior to the securing of orders for interstate shipment, in which activity the seller may or may not engage at his election.

The opinion, in part, says:.

"It then becomes pertinent to determine whether it can be fairly said that the instant act, in this case, clearly constitutes a direct and undue burden upon interstate commerce. The measure is clear and concise; before it is applicable there must be the following requisites set forth in the law: (a) the act, i. e., the display of samples, goods, etc., (b) the place, i. e., in a hotel room or temporarily occupied house, (c) the mental element, or purpose, i. e., for the purpose of securing orders for retail sale of goods, etc., and (d) the person, i. e., one not a regular merchant. In essence, the tax is one imposed upon anyone, not otherwise taxed as a retail merchant, *who uses* a North Carolina hotel room or temporarily occupied house, for commercial display purposes in the interest of retail sales. *It is a use tax, levied in the State of North Carolina*

upon profitable and commercial activity which has otherwise escaped taxation and which, therefore, discriminates against no one but seeks to remove a discrimination previously existing against regular taxed retail merchants. Under this statute the act taxed must occur in North Carolina, and the room where the act transpires must be within the State. The taxed activity must be directed at the retail trade in North Carolina, seeking to reach personally the citizens and residents of this State. The measure does not in any way impinge upon the activities of the wholesale trade, nor does it discriminate against nonresidents. All citizens and residents of North Carolina, and nonresidents alike (other than retail merchants who have already been taxed for their commercial activities) who engage in the taxable activity are liable for the tax. The taxed act is a local one, *involving the use of purely local property.*" (Emphasis ours.)

The very complete and lucid analysis by the Supreme Court of North Carolina of the taxing statute found in the opinion amply supported the conclusion reached by that Court, that the tax was a use tax imposed by the State of North Carolina on local property which might be used by the lessee for securing orders for local or interstate shipments of merchandise. The opinion of the Supreme Court of North Carolina provides a definite and complete construction of the act in question, at variance with the construction placed upon said act by the appellant.

The construction of a State statute by the highest court of the State is binding upon the Supreme Court.

Memphis & Ch. R. Co. v. Pace, 282 U. S. 241, 75 L. Ed. 315;

Highland Farms Dairy v. Agnew, 300 U. S. 608, 81 L. Ed. 835;

Midland Realty Co. v. Kansas City P. & L. Co., 300 U. S. 109, 81 L. Ed. 540;

Chicago M. & St. P. R. Co. v. Sisty, 276 U. S. 567, 72 L. Ed. 703;

Lauf v. E. G. Shinner & Co., 303 U. S. 323, 82 L. Ed. 872;

J. Bacon & Sons v. Martin, 305 U. S. 380, 83 L. Ed. 233.

A close decision of the judges of the highest court of the State does not prevent the opinion of the majority from becoming the opinion of the court, which will be conclusive upon the Federal Court as to State law.

Williams v. Eggleston, 170 U. S. 304.

The appeal in this case, therefore, essentially involves the right of the State court to construe a State taxing statute and, in effect, asserts that the construction placed upon a State statute by the highest court of appeal in such State is not binding upon the Supreme Court of the United States. This is not a substantial question within the meaning of the rules of this Court, as it is believed the question has already been clearly and definitely otherwise determined by the cases above mentioned.

II. The Taxing Act Does Not Violate the Commerce Clause.

1. The tax imposed by the statute under examination is imposed upon the use of "any hotel room" or the use of "any house rented or occupied temporarily" for the display of samples, goods, wares, or merchandise.

Public Laws of 1937, Chapter 127, Section 121(e);
Best & Company, Inc. v. Maxwell, 216 N. C. 114.

Cases which condemn taxes levied by states directly upon the business of offering for sale or selling goods by a non-resident in interstate commerce, have no application to the tax here under consideration. *Robbins v. Shelby County*

Taxing District, 120 U. S. 489, and the other cases cited by Best & Company, Inc., under V of its brief in support of its petition for appeal, have no application to the tax here under consideration.

The taxing statute as construed by the Supreme Court of North Carolina, which is binding upon this Court, is excluded from the condemnation of the decision in the *Robbins v. Shelby County Taxing District* Case, *supra*, and similar cases, by the language of the opinion in *McGoldrick v. Berwind-White Coal Mining Co.*, 308 U. S. —; 60 S. Ct. 388, in which it is said:

“It is enough for the present purpose that the rule of *Robbins v. Shelby County Taxing District*, *supra*, has been narrowly limited to fixed sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate.”

In the present case there is a fixed sum license, but as construed by the Supreme Court of North Carolina, the tax is not imposed on the business of soliciting orders for the purchase of goods to be shipped interstate, but is imposed for the use of local property in North Carolina.

2. The tax reaches those who are not regular retail merchants in the State of North Carolina as distinguished from regular retail merchants in the State of North Carolina. Retail merchants are defined in public Laws of 1937, Chapter 127, Section 404, subsection 5, and these retail merchants are taxed under Public Laws of 1937, Chapter 127, Section 405, for engaging in and conducting such business, and under subsection (6) of the same section 3% of the total gross sales. One not a regular retail merchant in North Carolina but engaging in merchandising by securing orders for the retail sale of goods, wares, or merchandise is subject only to the tax imposed by the statute under question.

The regular retail merchant in North Carolina is subject to other taxes, but it is by the statute under question that one not a regular retail merchant in North Carolina is made to bear some part of the cost of government. It is the nature of the business in which he engages that requires the fixing of a specified tax which is, though not stated in the law, in lieu of all other taxes to the State of North Carolina.

3. The tax imposed by the statute is not related to the movement of any article in commerce. It is not imposed for the movement in interstate commerce, nor does it relate to the right to move or to the offer to move an article in interstate commerce. It is the same for the use of the hotel room or the house independent of any sale, and accrues before any act is performed which may, coupled with other acts, result in the movement of an article in interstate commerce. The use of the hotel room or the house is taxed the same whether the use is by a resident of North Carolina or a non-resident of the State.

4. The privilege of use is only one attribute, among many of the bundle of privileges that make up property or ownership.

Henneford v. Silas Mason Co., 300 U. S. 577.

This right of the State to tax the privilege of use is approved in the *Henneford* case.

5. The mere formation of a contract between persons in different States is not within the protection of the commerce clause.

Western Live Stock v. Bureau of Revenue, 303 U. S. 250, and cases cited therein.

In the instant case the plaintiff used a hotel room from which its representatives solicited orders. It is very sig-

nificant that in the *Western Live Stock* case the income taxed included that derived from an out-of-State advertiser who sent his cut to the publisher to occupy space in the magazine, the publishing of which solicited orders to be filled by the out-of-State advertiser. In many instances, no doubt, orders came from out-of-State readers of the magazine and thus the State was allowed to take tribute only because of the use of the magazine space to solicit orders. It is no less a use of property because the plaintiff in the instant case, chose to occupy a hotel room and not space in a magazine in North Carolina.

6. A definite separate act done or performed within a State may be taxed even where the act assists in a movement in interstate commerce.

Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U. S. 604.

In the *Coverdale* case the tax was applied upon the creation of energy which was used in pushing along, in its passage from one State to another, the contents of a pipe line used for interstate transportation.

In the instant case the hotel room is the "prime mover"—that place or thing giving the agent of plaintiff the opportunity to exert a push upon the commerce contemplated. The hotel room was the chamber in which the purchaser met the seller and made a contract. Into the hotel room came the prospective looker and buyer to produce the demand for the transmission of merchandise. The agent in charge was the medium through which the orders were taken and transmitted,—he was the compressor. Without the hotel room plaintiff in this case would have been without the place to produce the business which can be freely transmitted after this use of the room for the creation of the business. That use of that hotel room was just as much local as the use by a regular retail merchant as his store space is local.

7. The commerce clause does not close the door to the state's power to tax property used in connection with interstate commerce, nor does it prevent a tax upon the use of property within a State even where the use is in connection with interstate commerce.

Postal Telegraph-Cable Co. v. Richmond, 249 U. S. 252;

Eastern Air Transport, Inc. v. Tax Commission, 285 U. S. 147;

Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U. S. 249;

Edelman v. Boeing Air Transport, Inc., 289 U. S. 249.

If the tax under question complements local taxes against regular merchants, it is not to be condemned because levied by the State of North Carolina.

General American Tank Car Corp. v. Day, 270 U. S. 367.

The rule stated in the above case is in the following language:

"When the taxing statute which is in lieu of a local tax assessed on residents discloses no purpose to discriminate against non-resident taxpayers, and in substance, does not do so, it is not invalid merely because equality in its equation, as compared with local taxation has not been attained with mathematical exactness."

III. The Taxing Act Does Not Violate Article IV, Section 2, or Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(1) At page 15 of its original brief, Best & Company states its second objection to the statute in question as follows:

"II. The taxing action in question is unconstitutional also as offending against the privileges and immunities

and the equal protection of the law clauses of the Constitution of the United States, being Article IV, Sec. 2, and Amendment 14, Sec. 1."

The questions thus raised by Best & Company, before the Supreme Court of North Carolina under this second proposition, involve two provisions of the Constitution of the United States, namely (a) Article IV, Section 2, which entitles the citizens of each State to all privileges and immunities of citizens in the several States, and (b) the privileges and immunities clause and the equal protection clause of the Fourteenth Amendment, Section 1.

Art. IV. Sec. 2: (a)

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

Corporations are not citizens within the meaning of this clause but it applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature and possessing only the attributes which the legislature has prescribed.

Paul v. Virginia, 8 Wall. 168;

Black v. McClung, 172 U. S. 239;

Sully v. American Nat'l Bank, 178 U. S. 289;

Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114.

The appellant apparently abandons the contention of violation of Article IV, Section 2, of the Constitution, as such contention is not brought forward in the jurisdictional statement filed by appellant.

(b)

Amendment 14, Sec. 1:

" * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

1. It is well settled that a corporation cannot claim the protection of the clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a State.

Selover, B. & Co. v. Walsh, 226 U. S. 112;

Berea College v. Kentucky, 211 U. S. 45;

Liberty Warehouse Co. v. Burley Tobacco Growers Co-Op. Marketing Asso., 276 U. S. 71;

Orient Ins. Co. v. Daggs, 172 U. S. 557;

Grosjean v. American Press Co., 297 U. S. 233.

2. The classification in the act relates to those who are "not regular retail merchants" and has no relationship to citizenship or non-citizenship of the State. Therefore, Section 1 of the Fourteenth Amendment is not involved.

La Tourette v. McMaster, 248 U. S. 465, 39 Sup. Ct. Rep. 160, 63 L. Ed. 362 (1919).

This case was cited with approval and followed in later cases:

Maxwell v. Bugbee, 250 U. S. 525, 40 Sup. Ct. Rep. 2, 63 L. Ed. 1124 (1919);

Douglas v. New York, N. H. and H. R. Co., 279 U. S. 377, 49 Sup. Ct. Rep. 355, 73 L. Ed. 747 (1929)

In the latter case the Court said at page 387:

"Construed as it has been and we believe will be construed, the statute applies to citizens of New York as well as to others and puts them on the same footing. There is no discrimination between citizens as such,

and none between non-residents with regard to these foreign causes of action. A distinction of privileges according to residence may be based upon rational considerations and has been upheld by this court, emphasizing the difference between citizenship and residence, in *LaTourette v. McMaster*, 248 U. S. 465, 63 L. Ed. 362, 39 Sup. Ct. Rep. 160. Followed in *Maxwell v. Bugbee*, 250 U. S. 525, 539, 63 L. Ed. 1124, 1131, 40 Sup. Ct. Rep. 2. It is true that in *Blake v. McClung*, 172 U. S. 239, 247, 43 L. Ed. 432, 435, 19 Sup. Ct. Rep. 165, 'residents' was taken to mean citizens in a Tennessee statute of a wholly different scope, but whatever else may be said of the argument in that opinion (compare p. 262, *id.*) it cannot prevail over the later decision in *La Tourette v. McMaster*, and the plain intimations of the New York cases to which we have referred. There are manifest reasons for preferring residents in access to often overcrowded courts, both in convenience and in the fact that, broadly speaking, it is they who pay for maintaining the courts concerned."

3. It is settled that the equal protection clause of the Fourteenth Amendment does not preclude the States from resorting to classification for the purpose of legislation, and this power of the States is of wide range and flexibility.

Colgate v. Harvey, 296 U. S. 404;

Royster Guano Co. v. Virginia, 253 U. S. 412;

Louisville Gas & E. Co. v. Coleman, 277 U. S. 32.

Classification must be based on a real and substantial difference. It may not be altogether illusory, but where there is a difference, it need not be great or conspicuous.

Southern R. Co. v. Green, 216 U. S. 400;

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389;

Colgate v. Harvey, 296 U. S. 404;

Royster Guano Co. v. Virginia, 253 U. S. 412;

Keeney v. New York, 222 U. S. 525;

State Tax Comrs. v. Jackson, 283 U. S. 527.

Equal protection is not denied merely by adjusting revenue laws and taxing systems so as to favor certain industry, even if the tax law favors a regular North Carolina merchant over one who is not a regular North Carolina merchant.

Irving v. Kirkendall, 223 U. S. 59;

Hammond Packing Co. v. Montana, 233 U. S. 331.

It is not the function of the Court to consider the propriety or justness of the tax, the motives for its enactment, nor the public policy which prompted it. The Court considers only the classification and it is enough if the classification is real and does not favor one as against another of the same class.

State Tax Comrs. v. Jackson, 283 U. S. 527;

Giozza v. Tiernan, 148 U. S. 657.

The questions involved, therefore, not being substantial, the appellee moves the Court that the appeal be not allowed.

Respectfully submitted,

HARRY McMULLAN,
Attorney General,

T. W. BRUTON;

Assistant Attorney General.

I. M. BAILEY,

All of Raleigh, North Carolina,
Attorneys for the Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 961

BEST & COMPANY, INC.

vs.

**A. J. MAXWELL, COMMISSIONER OF REVENUE OF THE STATE
OF NORTH CAROLINA.**

MOTION.

Harry McMullan, Attorney General of North Carolina, respectfully moves this Court to strike from the record the license issued to Best & Company, Inc., by the Commissioner of Revenue for the State of North Carolina, referred to in the praecipe, indicating portions of the record to be incorporated into the transcript, as Item 6, and appearing in the record, for the reason that this license was not introduced in evidence and is not a part of the record below.

Respectfully submitted,

HARRY McMULLAN,
Attorney General of North Carolina.

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CLERK

SUPREME COURT OF THE UNITED STATES
October Term, 1940

No. 61

BEST & COMPANY, INC.
Appellant,

vs.

A. J. MAXWELL, COMMISSIONER OF REVENUE OF
THE STATE OF NORTH CAROLINA

APPEAL FROM THE SUPREME COURT OF THE
STATE OF NORTH CAROLINA

BRIEF ON BEHALF OF A. J. MAXWELL, COMMISSIONER OF
REVENUE OF THE STATE OF NORTH CAROLINA

✓ **HARRY McMULLAN,**
Attorney General of North Carolina

T. W. BRUTON,
Assistant Attorney General of North Carolina

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W. C. LASSITER,

Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 61

BEST & COMPANY, INC.

Appellant,

vs.

A. J. MAXWELL, COMMISSIONER OF REVENUE OF

THE STATE OF NORTH CAROLINA

APPEAL FROM THE SUPREME COURT OF THE

STATE OF NORTH CAROLINA

BRIEF ON BEHALF OF A. J. MAXWELL, COMMISSIONER OF

REVENUE OF THE STATE OF NORTH CAROLINA

STATEMENT OF CASE

The Supreme Court of North Carolina in the case of **BEST & COMPANY v. A. J. MAXWELL**, Commissioner of Revenue of North Carolina, 216 N. C. 114 (petition to rehear, 217 N. C. 134), construed Section 121, Subsection (e) of the Revenue Act of North Carolina, Chapter 127 of the Public Laws of North Carolina of 1937, and held that under this Act as con-

strued and applied to the agreed statement of facts under which the case was submitted, the plaintiff (appellant herein) was not entitled to recover the sum of \$250.00, tax paid by said appellant under protest.

The facts in this case are stipulated and appear in the record (R. p. 7). A succinct statement, however, is as follows:

The plaintiff, having decided that it wanted to sell goods, wares and merchandise in Winston-Salem, North Carolina, rented a room or rooms in the Robert E. Lee Hotel in that city. In the room goods, wares and merchandise were displayed, orders were taken from people who came in, and the goods, wares and merchandise were shipped from New York City. The plaintiff is not a regular retail merchant in the State of North Carolina and pays no tax in this State except the tax involved in this action.

The defendant, under authority of Subsection (e), Section 121, Public Laws, 1937, Revenue Act, levied a tax upon the Plaintiff, and the tax was paid under protest. This action is to recover the tax.

ARGUMENT

STATEMENT OF POSITION OF APPELLEE

The appellee takes the following position upon this appeal:

(1) The Supreme Court of North Carolina properly construed the statute as imposing a valid tax upon the use of local property in North Carolina against all persons in a designated class, whether resident or non-resident.

(2) The construction of a State statute by the highest court of the State is binding upon the Supreme Court of the United States.

(3) The taxing act does not violate the commerce clause of the Constitution of the United States.

(4) The taxing act does not violate Article IV, Section 2, or Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(5) The rule in **ROBBINS v. SHELBY TAXING DISTRICT**, 120 U. S. 489 does not apply to the statute involved in this case.

(6) The statute under consideration does not discriminate.

(7) The statute under consideration does not violate Section 1 of the Fourteenth Amendment to the Constitution of the United States.

I—THE SUPREME COURT OF NORTH CAROLINA PROPERLY CONSTRUED THE STATUTE AS IMPOSING A USE TAX

The opinion of the Supreme Court of North Carolina held that the provision of Chapter 127, Section 121 (e), of the Revenue Act of 1937 imposing a tax upon the display of samples of goods in a hotel room or temporarily occupied house for the purpose of securing orders for the retail sale of such goods by any person, firm or corporation not a regular retail merchant in the State does not impose a burden upon interstate commerce and is valid, since the tax is imposed alike upon residents and nonresidents engaged in the activity defined and is a use tax levied upon the local use of hotel rooms and temporarily occupied houses for the purpose of promoting retail sales by persons not otherwise taxed as retail merchants, and since the activity taxed is a preliminary and nonessential activity transpiring prior to the securing of orders for interstate shipment, in which activity the seller may or may not engage at his election.

The opinion, in part, says

"It then becomes pertinent to determine whether it can be fairly said that the instant act, in this case, clearly constitutes a direct and undue burden upon interstate commerce. The measure is clear and concise; before it is applicable there must be the following requisites set forth in the law: (a) the act, i. e., the display of samples, goods, etc., (b) the place, i. e., in a hotel room or temporarily occupied house, (c) the mental element, or purpose,

i. e., for the purpose of securing orders for retail sale of goods, etc., and (d) the person, i. e., one not a regular merchant. In essence, the tax is one imposed upon anyone, not otherwise taxed as a retail merchant, who uses a North Carolina hotel room or temporarily occupied house, for commercial display purposes in the interest of retail sales. It is a use tax, levied in the State of North Carolina upon profitable and commercial activity which has otherwise escaped taxation and which, therefore, discriminates against no one but seeks to remove a discrimination previously existing against regular, taxed, retail merchants. Under this statute the act taxed must occur in North Carolina, and the room where the act transpires must be within the State. The measure does not in any way impinge upon the activities of the wholesale trade, nor does it discriminate against nonresidents. All citizens and residents of North Carolina, and nonresidents alike (other than retail merchants who have already been taxed for their commercial activities) who engage in the taxable activity are liable for the tax. The tax act is a local one, involving the use of purely local property. The tax in no way hampers the movement of the samples, goods, etc., or of the merchandise sold, in interstate commerce. The tax in no way regulates the interstate or out-of-state activity of the person seeking to sell by display in North Carolina, nor does it in any way interfere with sales by sample by house-to-house canvassers. Finally, the measure leaves open to the seller the choice as to the manner of soliciting retail sales by display; only when he seeks to localize his commercial activity by temporarily establishing himself at a rented and temporary location within this State in his activity in displaying samples and seeking orders subjected to taxation. Although such activity may be in the twilight zone of interstate commerce, it does not enter that enchanted realm. Although such displaying by sample may ultimately result in orders which will flow into interstate commerce, such commercial activity cannot cloak itself in immunity from taxation merely by calling the magic words, "Interstate Commerce." The use of North Caro-

lina real estate for the purpose of displaying samples is commercially intended to result in interstate commerce, but this preliminary activity is merely a separate and distinct effort of the seller seeking as in the instances of magazine and billboard advertising to stimulate the desire for the seller's goods. **WESTERN LIVESTOCK v. BUREAU OF REVENUE**, 303 U. S. 250.

"The display use of hotel rooms and temporarily rented property here taxed is not a usual, necessary, or essential part of a commercial, retail business. It is a preliminary and incidental activity which, at the election of the seller, may or may not transpire prior to the beginning of the flow of event which constitute the movement of goods in interstate commerce. There is a striking analogy here to production, which has consistently been held not to constitute interstate commerce. **CARTER v. CARTER COAL CO.**, 298 U. S., 238."

The very complete and lucid analysis by the Supreme Court of North Carolina of the taxing statute found in the opinion amply supported the conclusion reached by that Court, that the tax was a use tax imposed by the State of North Carolina on local property which might be used by the lessee for securing orders for local or interstate shipments of merchandise. The opinion of the Supreme Court of North Carolina provides a definite and complete construction of the act in question, at variance with the construction placed upon said act by the appellant.

II—THE CONSTRUCTION OF A STATE STATUTE BY THE HIGHEST COURT OF THE STATE IS BINDING UPON THE SUPREME COURT OF THE UNITED STATES

The constitutionality of a State statute must be decided upon the construction that the State Supreme Court has placed upon the statute.

MIDLAND REALTY CO. v. KANSAS CITY POWER & LIGHT CO., 300 U. S. 109, 81 L. Ed. 540;

MEMPHIS & CH. R. CO. v. PACE, 282 U. S. 241, 75 L. Ed. 315;

HIGHLAND FARMS DAIRY v. AGNEW, 300 U. S. 608, 81 L. Ed. 835;

CHICAGO M. & ST. P. R. CO. v. RISTY, 276 U. S. 567, 72 L. Ed. 703;

LAUF v. E. G. SHINNER & CO., 303 U. S. 323, 82 L. Ed. 872;

J. BACON & SONS v. MARTIN, 305 U. S. 380, 83 L. Ed. 233.

The decision of the highest court of North Carolina, to the extent it is not changed upon petition to rehear, becomes the law in this case as to the nature and character of the tax, and the construction is conclusive on the Federal Court as to State law.

WILLIAMS v. EGGLESTON, 170 U. S. 304.

The appeal in this case, therefore, essentially involves the right of the State court to construe a State taxing statute and, in effect, asserts that the construction placed upon a State statute by the highest court of appeal in such State is not binding upon the Supreme Court of the United States. This is contrary to the decisions of this Court.

The principle that the construction placed upon a state law by the highest court of that state is conclusive upon the Supreme Court of the United States is so well established that the appeal in the case of *J. Bacon & Sons v. Martin*, *supra*, was dismissed by a "per curiam" opinion.

The tax statute imposed a tax on "the receipt of cosmetics in the State by any retailer." The Kentucky court held that the word "receipt" is not used in a limited sense, but in the sense that it has already been received by the retailer and is now in his use. Upon this construction the court of Kentucky sustained the law, and the Supreme Court of the United States said:

"The construction of the statute by the state court is binding upon us. *Supreme Lodge, Knights of Pythias v. Meyer*, 265 U. S. 30, 32, 33, 44 S. Ct. 432 433, 68 L. Ed. 885; *Hicklin v Coney*, 290 U. S. 169, 172, 54 S. Ct. 142, 144, 78 L. Ed. 247; *Hartford Accident & Indemnity Co. v. N. O. Nelson Manufacturing Co.*, 291 U. S. 352, 358, 54 S. Ct. 392, 394, 78 L. Ed. 840. And in the light of its construction the state court applied the principles declared in our decisions. *Monamotor Oil Company v. Johnson*, 292 U. S. 86, 93, 54, S. Ct. 575, 578, 78 L. Ed. 1141; *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 478, 479, 52 S. Ct. 631, 633, 634, 76 L. Ed. 1232, 84 A. L. R. 831; *Nashville, C. & St. L. Rwy. Co. v Wallace*, 288 U. S. 249, 265, 266; 53 S. Ct. 345, 349, 77 L. Ed. 730, 87 A. L. R. 1191; *Edelman v. Boeing Air Transport, Inc.*, 289 U. S. 249, 252, 53 S. Ct. 591, 592, 77 L. Ed. 1155."

III—THE TAXING ACT DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES

1. The tax imposed by the statute under examination is imposed upon the use of "any hotel room" or the use of "any house rented or occupied temporarily" for the display of samples, goods, wares, or merchandise.

Public Laws of 1937, Chapter 127, Section 121 (e);

BEST & COMPANY, INC. v. MAXWELL, 216 N. C. 114.

Cases which condemn taxes levied by states directly upon the business of offering for sale or selling goods by a non-resident in interstate commerce, have no application to the tax here under consideration. **ROBBINS v. SHELBY COUNTY TAXING DISTRICT**, 120 U. S. 489, and the other cases cited by Best & Company, Inc., in its brief have no application to the tax here under consideration. See Appendix A.

The taxing statute as construed by the Supreme Court of North Carolina, which is binding upon this Court as to the nature and character of the tax, is excluded from the condemnation of the decision in the **ROBBINS v. SHELBY COUNTY TAXING DISTRICT** Case, *Supra*, and similar cases, by the

language of the opinion in *McGOLDRICK v. BERWIND-WHITE COAL MINING CO.*, 308 U. S. 33; 60 S. Ct. 388, in which it is said:

"It is enough for the present purpose that the rule of *ROBBINS v. SHELBY COUNTY TAXING DISTRICT*, supra, has been narrowly limited to fixed sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate."

In the present case there is a fixed sum license, but as construed by the Supreme Court of North Carolina, the tax is not imposed on the business of soliciting orders for the purchase of goods to be shipped interstate, but is imposed for the use of local property in North Carolina.

2. The tax reaches those who are not regular retail merchants in the State of North Carolina as distinguished from regular retail merchants in the State of North Carolina. Retail merchants are defined in Public Laws of 1937, Chapter 127, Section 404, subsection 5, and these retail merchants are taxed under Public Laws of 1937, Chapter 127, Section 405, for engaging in and conducting such business, and under subsection (B) of the same section, 3% of the total gross sales. One not a regular retail merchant in North Carolina but engaging in merchandising by securing orders for the retail sale of goods, wares, or merchandise is subject only to the tax imposed by the statute under question when temporary use is made of any hotel room or house.

The regular retail merchant in North Carolina is subject to other taxes, but it is by the statute under question that one not a regular retail merchant in North Carolina is made to bear some part of the cost of government. It is the nature of the business in which he engages that requires the fixing of a specified tax which is, though not stated in the law, in lieu of all other taxes to the State of North Carolina.

3. The tax imposed by the statute is not related to the movement of any article in commerce. It is not imposed for the movement in interstate commerce, nor does it relate to the right to move or to the offer to move an article in inter-

state commerce. It is the same for the use of the hotel room or the house independent of any sale, and accrues before any act is performed which may, coupled with other acts, result in the movement of an article intrastate or interstate commerce. The use of the hotel room or the house is taxed the same whether the use is by a resident of North Carolina or a non-resident of the state.

The use of a hotel room or house is taxed the same whether or not, as a result, a sale is negotiated, and whether or not, assuming a sale is negotiated, a shipment of goods is required intrastate or interstate.

4. The privilege of *use* is only one attribute, among many of the bundle of privileges that make up property or ownership.

HENNEFORD v. SILAS MASON CO., 300 U. S. 577.

This right of the State to tax the privilege of *use* is approved in the HENNEFORD Case as follows:

"The privilege of use is only one attribute, among many of the bundle of privileges that make up property or ownership. NASHVILLE, C. & ST. L. RY. CO. v. WALLACE, supra; BROMLEY v. McCAUGHN, 280 U. S. 124, 136-138, 50 S. Ct. 46, 48, 74 L. Ed. 226; BURNETT v. WELLS, 289 U. S. 670, 678, 53 S. Ct. 761, 764, 77 L. Ed. 1439. A state is at liberty, if it pleases, to tax them all collectively, or to separate the fagots and lay the charge distributively. Id. Calling the tax an excise when it is laid solely upon the use (VANCOUVER OIL CO. v. HENNEFORD, 183 Wash. 317, 49P. (2d) 14), does not make the power to impose it less, for anything the commerce clause has to say of its validity, than calling it a property tax and laying it on ownership. 'A nondiscriminatory tax upon local sales . . . has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the state may be subjected.' EASTERN AIR TRANSPORT, INC. v. SOUTH CAROLINA TAX COM-

MISSION, 285 U. S. 147, 153, 52 S. Ct. 340, 341, 76 L. Ed. 673. A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate. NASHVILLE, C. & ST. L. RY. CO. v. WALLACE, *supra*; EDELMAN v. BOEING AIR TRANSPORT, INC., *supra*; MONAMOTOR OIL CO. v. JOHNSON, *supra*; Cf. VANCOUVER OIL CO. v. HENNEFORD, *supra*."

5. The mere formation of a contract between persons in different states is not within the protection of the commerce clause.

WESTERN LIVE STOCK v. BUREAU OF REVENUE, 303 U. S. 250, at 253, deals with a tax challenged under the commerce clause in the following language:

"Appellants insist here, as they did in the state courts, that the sums earned under the advertising contracts are immune from the tax because the contracts are entered into by transactions across state lines and result in the like transmission of advertising materials by advertisers to appellants, and also because performance involves the mailing or other distribution of appellants' magazines to points without the State.

"That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question. PAUL v. VIRGINIA, 8 Wall, 168, 19 L. Ed. 357; HOOPER v. CALIFORNIA, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297; NEW YORK LIFE INS. CO. v. DEER LODGE COUNTY, 231 U. S. 495, 34 S. Ct. 167, 58 L. Ed. 332. Cf. WARE & LELAND v. MOBILE COUNTY, 209 U. S. 405, 28 S. Ct. 526, 52 L. Ed. 855, 14 Ann. Cas. 1031; ENGEL v. O'MALLEY, 219 U. S. 128, 31 S. Ct. 190, 55 L. Ed. 128. Hence it is unnecessary to consider the impact of the tax upon the advertising contracts except as it affects their performance, presently to be discussed. Nor is taxation

of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the business. *WILLIAMS v. FEARS*, 179 U. S. 270, 21 S. Ct. 128, 45 L. Ed. 186; *WARE & LELAND v. MOBILE COUNTY*, *supra*; *BROWNING v. WAYCROSS*, 233 U. S. 16, 34 S. Ct. 578, 58 L. Ed. 828; *GENERAL RAILWAY SIGNAL CO. v. VIRGINIA*, 246 U. S. 500, 510, 38 S. Ct. 360, 62 L. Ed. 854; *UTAH POWER & LIGHT CO. v. PFOST*, 286 U. S. 165, 52 S. Ct. 548, 76 L. Ed. 1038. Here the tax which is laid on the compensation received under the contract is not forbidden either because the contract, apart from its performance, is within the protection of the commerce clause, or because as an incident preliminary to printing and publishing the advertisements the advertisers send cuts, copy and the like to appellants.

At page 254, the Court further says:

"It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way,' *POSTAL TELEGRAPH-CABLE CO. v. RICHMOND*, 249 U. S. 252, 259, 39 S. Ct. 265, 266, 63 L. Ed. 590; *FICKLEN v. SHELBY COUNTY TAXING DISTRICT*, 145 U. S. 1, 24, 12 S. Ct. 810, 36 L. Ed. 601 (citing other cases); and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. He is subject to a property tax on the instruments employed in the commerce, *WESTERN UNION TELEGRAPH CO. v. MASSACHUSETTS*, 125 U. S. 530, 8 S. Ct. 961, 31 L. Ed. 790 (citing other cases); and if the property devoted to interstate transportation is used both within and without the state, a tax fairly apportioned to its use within the State will be sustained, *PULLMAN'S PALACE-CAR CO. v. PENNSYLVANIA*, 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613, *CUDAHY PACKING CO.*

v. MINNESOTA, 246 U. S. 450, 38 S. Ct. 373, 62 L. Ed. 827. Net earning from interstate commerce are subject to income tax, UNITED STATES GLUE CO. v. OAK CREEK, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748, and, if the commerce is carried on by a corporation, a franchise tax may be imposed, measured by the net income from business done within the state, including such portion of the income derived from interstate commerce as may be justly attributable to business done within the state by a fair method of apportionment, UNDERWOOD TYPEWRITER CO. v. CHAMERLAIN, 254 U. S. 113, 41 S. Ct. 45, 65 L. Ed. 165. Cf. BASS, RATCLIFF & GRETTON, LTD. v. STATE TAX COMMISSION, 266 U. S. 271, 45 S. Ct. 82, 69 L. Ed. 282.

"All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable in point of substance, of being imposed, FARGO v. STEVENS, MICHIGAN, 121 U. S. 230, 7 S. Ct. 857, 30 L. Ed. 888; PHILADELPHIA & S. M. S. S. CO. v. PENNSYLVANIA, 122 U. S. 326, 7 S. Ct. 1118, 30 L. Ed. 1200 (citing other cases); with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. See PHILADELPHIA, & S. M. S. S. Co. v. PENNSYLVANIA, supra, 122 U. S. 326, 346, 7 S. Ct. 1118, 30 L. Ed. 1200 (citing other cases): BRADLEY J., dissenting in MAINE v. GRAND TRUNK RAILWAY CO., 142 U. S. 217, 235, 12 S. Ct. 121, 163, 35 L. Ed. 994. Cf. PULLMAN'S PALACE-CAR CO. v. PENNSYLVANIA, supra, 141 U. S. 18, 26, 11 S. C. 876, 35 L. Ed. 613. The multiplication of state taxes measured by the gross receipts from interstate transactions would spell

the destruction of interstate commerce and renew the barriers to interstate trade which was the object of the commerce clause to remove. **BALDWIN v. G. A. F. SEELIG**, 294 U. S. 511, 523, 55 S. Ct. 497, 500, 79 L. Ed. 1032, 101 A. L. R. 55."

In the instant case the Plaintiff (appellant) used a hotel room from which its representative solicited orders. It is very significant that in the **WESTERN LIVESTOCK** Case the income taxed included that derived from an out-of-state advertiser who sent his cut to the publisher to occupy space in the magazine, the publishing of which solicited orders to be filled by the out-of-state advertiser. In many instances, no doubt, orders came from out-of-state readers of the magazine and thus the state was allowed to take tribute only because of the use of the magazine space to solicit orders. It is no less a use of property because the plaintiff, in the instant case, chose to occupy a hotel room and not a space in a magazine published in North Carolina.

6. A definite separate act done or performed within a state may be taxed even where the act assists in a movement in interstate commerce.

COVERDALE v. ARKANSAS-LOUISIANA PIPE LINE CO., 303 U. S. 604, 611.

In the **COVERDALE** Case the tax was applied upon the creation of energy which was used in pushing along, in its passage from one state to another, the contents of a pipe line used for interstate transportation. The court said at 611:

"The power used by appellee is obtained from internal combustion engines which transform the potential energy of natural gas into mechanical power, transmitted by piston and piston-rod from the combustion chamber of the engine to the compression chamber of the compressor. While the engine and compressor units are assembled on a common bed plate, their functions are thus seen to be as completely separate as if they operated

through belting. The engine is the 'prime mover' of the tax act, producing power to drive the compressor. While the use of the engine for the production of power synchronizes with the transmission of that power to the compressor, production occurs prior to transmission. It is just as much local as the generation of electrical power."

Having located the "prime mover," the Court says at 612:

"Third. To determine whether this challenged state tax enactment is invalid as an interference with interstate commerce under the decisions of this Court, the connection of the privilege taxed with interstate commerce has been considered. Other factors also show that the tax here does not interfere with interstate commerce. The tax is without discrimination in form or application as between inter and intra state commerce and it cannot be imposed by more than one state. The course of interstate commerce is clogged by taxes designed or applied so as to hamper its free flow. Section three, however, bearing equally on all use, is only complementary to the taxes of sections 1 and 2 *HENNEFORD v. SILAS MASON CO.*, 300 U. S. 577, 584, 57 S. Ct. 524, 527, 81 L. Ed. 814. It bears generally on all use of power and is not discriminatory. It obviously adds to the cost of the interstate commerce. But increased cost alone is not sufficient to invalidate the tax as an interference with that commerce *WESTERN LIVESTOCK v. BUREAU OF REVENUE* 303 U. S. at 250, 58 S. Ct. 546, 82 L. Ed. 823, *supra*."

In the instant case the hotel room is the "prime mover"—that place or thing giving the agent of plaintiff the opportunity to exert a push upon the commerce contemplated. The hotel room was the chamber in which the purchaser met the seller and made a contract. Into the hotel room came the prospective looker and buyer to produce the demand for the transmission of merchandise. The agent in charge was the medium through which the orders were taken and transmitted,—he was the compressor. Without the hotel room

plaintiff in this case would have been without the place to produce the business which can be freely transmitted after this use of the room for the creation of the business. That use of that hotel room was just as much local as the use by a regular retail merchant of his store space is local.

7. The commerce clause does not close the door to the state's power to tax property used in connection with interstate commerce, nor does it prevent a tax upon the use of property within a state even where the use is in connection with interstate commerce.

POSTAL TELEGRAPH-CABLE CO. v. RICHMOND,
249 U. S. 252;

EASTERN AIR TRANSPORT, INC. v. TAX COMMISSION, 285 U. S. 147;

NASHVILLE, CHATTANOOGA & ST. LOUIS RY. v. WALLACE, 288 U. S. 249;

EDELMAN v. BOEING AIR TRANSPORT, INC., 289 U. S. 249.

8. If the tax under question complements local taxes against regular merchants, it is not to be condemned because levied by the State of North Carolina.

GENERAL AMERICAN TANK CAR CORP. v. DAY,
270 U. S. 367.

The rule stated in the above case is in the following language:

"When the taxing statute which is in lieu of a local tax assessed on residents discloses no purpose to discriminate against non-resident taxpayers, and in substance, does not do so, it is not invalid merely because equality in its equation, as compared with local taxation has not been attained with mathematical exactness."

9. The taxing statute, as the nature and character of the tax imposed has been fixed by the highest court of the state, does

not levy any tax which can be cumulative and multiplied by each state through which pass the articles sold. Taxing the use of the hotel room in North Carolina is an act which cannot be duplicated in any other state. The property right is local to the state where the appellant is taxed. Only taxes which are cumulative and can be multiplied on the same commerce by each state through which the commerce passes, and not taxes upon local property or the use of local property, have been condemned as violating the commerce clause.

**WESTERN LIVESTOCK v. BUREAU OF REVENUE,
303 U. S. 250.**

IV—THE TAXING ACT DOES NOT VIOLATE ARTICLE IV, SECTION 2, OR SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The appellant seeks to invoke two additional provisions of the Constitution of the United States, namely (a) Article IV, Section 2, which entitles the citizens of each state to all privileges and immunities of citizens in the several states, and (b) the privileges and immunities clause and the equal protection clause of the Fourteenth Amendment, Section 1.

(a)

Art. IV, Sec. 2—

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Corporations are not citizens within the meaning of this clause but applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature and possessing only the attributes which the legislature has prescribed.

PAUL v. VIRGINIA, 8 Wall. 168;

BLAKE v. McCLUNG, 172 U. S. 239;

SULLY v. AMERICAN NAT'L BANK, 178 U. S. 289;

NORFOLK & W. R. CO. v. PENNSYLVANIA, 136 U. S.

(b)

Amendment 14, Sec. 1.

"..... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

1. It is well settled that a corporation cannot claim the protection of the clause of the Fourteenth Amendment which secured the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a State.

SELOVER, B. & CO. v. WALSH, 226 U. S. 112;
BEREA COLLEGE v. KENTUCKY, 211 U. S. 45;
LIBERTY WAREHOUSE CO. v. BURLEY TOBACCO
GROWERS CO-OP. MARKETING ASSO. 276 U. S. 71;
ORIENT INS. CO. v. DAGGS, 172 U. S.; 557;
GROSJEAN v. AMERICAN PRESS CO., 297 U. S. 233.

2. It is settled that the equal protection clause of the Fourteenth Amendment does not preclude the States from resorting to classification for the purpose of legislation, and this power of the States is of wide range and flexibility.

COLGATE v. HARVEY, 296 U. S. 404;
ROYSTER GUANO Co. v. VIRGINIA, 253 U. S. 412;
LOUISVILLE GAS & E. CO. v. COLEMAN, 277 U. S. 32.

Classification must be based on a real and substantial difference. It may not be altogether illusory, but where there is a difference, it need not be great or conspicuous.

SOUTHERN R. CO. v. GREENE, 216 U. S. 400;
QUAKER CITY CAB CO. v. PENNSYLVANIA, 277 U. S.
389;

COLGATE v. HARVEY, 296 U. S. 404;
ROSYTER GUANO CO. v. VIRGINIA, 253 U. S. 412;
KEENEY v. NEW YORK, 222 U. S. 525;
STATE TAX COMRS. v. JACKSON, 283 U. S. 527.

Equal protection is not denied merely by adjusting revenue laws and taxing systems so as to favor certain industry, even if the tax law favors a regular North Carolina merchant over one who is not a regular North Carolina merchant.

QUONG WING v. KIRKENDALL, 223 U. S. 59;

HAMMOND PACKING CO. v. MONTANA, 233 U. S. 331.

It is not the function of the Court to consider the propriety or justness of the tax, the motives for its enactment, nor the public policy which prompted it. The Court considers only the classification and it is enough if the classification is real and does not favor one as against another of the same class.

STATE TAX COMRS. v. JACKSON, 283 U. S. 527;

GIOZZA v. TIERNAN, 148 U. S. 657.

THE RULE IN ROBBINS v. SHELBY TAXING DISTRICT, 120 U. S. 489 DOES NOT APPLY TO THE STATUTE INVOLVED IN THIS CASE.

The appellant, in its brief, is relying principally upon the rule stated in the ROBBINS Case and other cases applying the same rule. The rule in the ROBBINS Case does not apply to the tax here under consideration, as the taxing statute has been construed by the Supreme Court of North Carolina. The Supreme Court of the United States is bound by the construction placed upon the statute by the highest court of North Carolina, and if the tax is condemned, it must be upon some other basis than upon the rule in the ROBBINS Case.

There is attached hereto an analysis showing the statute and the holding of the court in each case listed in the Table of Cases in the plaintiff's brief dealing with the effect of a statute on interstate commerce. An examination will show that the statutes involved deal with (a) taxes upon sales made by drummers or peddlers as representatives of a foreign person or corporation or that require license before such sales can be made; (b) taxes against agents of express or railroad companies acting for interstate carriers; (c) taxes imposed in connection with the right of a corporation to exercise its franchise privileges within the state; (d) taxes

imposed upon the sale of goods imported from foreign countries; (e) the Anti-Trust Act; (f) the Grain Futures Act; (g) the Bituminous Coal Conservation Act of 1935; and (h) the National Labor Relations Act.

It is respectfully submitted that none of these cases, upon examination will overthrow the sound reasoning of the State court in its decision in this case or in any way contradict the contentions made by the defendant in his brief upon the appeal. Mere numbers do not outweigh principles, and the cases upon which the court relied in its opinion are not modified, overruled, or in any other manner changed by the opinions relied upon by the plaintiff, and since *ROBBINS v. SHELBY*, supra, is used extensively throughout the brief of the plaintiff, it seems safe to say that the plaintiff has not elected to deal with the field covered by the decisions of the Supreme Court of the United States relied upon by the defendant in urging the validity of the statute in issue. It is quite different for the statute to provide that before a person can make a sale as a representative of another he shall procure a license to make that sale, or, if he makes a sale as the representative of another, he shall pay a tax on that sale, and for the statute to say that for the use of a hotel room or a house rented or occupied temporarily in North Carolina a tax shall be paid.

It is urged by the plaintiff that the "use purpose" clause in the statute at issue controls as to the intent of the Legislature and that the statute imposes a tax upon one securing orders for the retail sale of goods, wares, or merchandise. The answer to this contention is the simple statement that the courts will not take interpretation of a statute which will destroy it if there is another interpretation equally apparent which will sustain the statute. The tax does not apply unless the hotel room or house is rented or occupied by the person, firm, or corporation not a regular retail merchant in the State of North Carolina. The statute does not apply to one who occupies a hotel room as a guest or for a conference, or rents or occupies temporarily a house as a home or for public meeting purposes. The statute does not tax orders for the retail sale of such goods. The Court will not assume that

the Legislature intended to enact a statute which would be invalid, but, on the other hand, the Court will assume that it was the intention of the Legislature to enact a valid statute and that in drawing the statute it had in mind the prohibitions under the commerce clause.

It is respectfully submitted that the decision of the State Court upon the question of the validity of the statute as affected by the commerce clause of the Constitution of the United States is sound and is sustained by authority of the Supreme Court of the United States.

As pointed out in the brief in this case on behalf of the defendant, the tax will be sustained if it is a legitimate tax, even though its name may be one thing and its application another. In this connection, it would seem that the plaintiff has fallen into a very unusual and unjustifiable position that a use tax is not a tax upon one not the owner for the privilege of temporarily occupying some one else's real property, when, as a matter of fact, the renting of a hotel room for one day is as much the exercise of the ownership of that room for the day as the leasing of a piece of land for fifty years, except as to the time for enjoyment and as to the use to which the respective properties can be put. The Legislature certainly has the right to pass a use tax, and to levy the tax upon any use which it thinks is sufficient to justify the tax. The State Court follows well recognized authority in holding that the tax imposed by the statute at issue is levied upon the use of a local hotel room or a house rented or temporarily occupied.

VI—THE STATUTE UNDER CONSIDERATION DOES NOT DISCRIMINATE.

The appellant contends that the taxing statute discriminates against it. This contention is not sound.

An examination of the taxing statute discloses that it is not discriminatory. The tax applies to the use of "any hotel room" or "any house rented or occupied temporarily", whether "rented or occupied" by a resident of North Carolina or a non-resident of North Carolina, if the person, firm or corporation is not a "regular retail merchant" in the State of North Carolina. It prevents a resident setting up, in a hotel

room or in a house rented or occupied temporarily, an establishment so like the establishment of a regular retail merchant as to be hardly distinguishable except by its temporary nature or an establishment that can compete with the regular retail merchants without comparable contribution to the support of the state government.

The tax applies to a non-resident only when he uses property or the rights of property which is local to North Carolina. THE TAX IS NOT, THEREFORE, DISCRIMINATORY AGAINST THE NON-RESIDENT because the statute taxes the non-resident only in those cases, and in the same amount that it taxes the resident who is not a regular retail merchant. The act under consideration shows a very careful and deliberate effort to place regular retail merchants and those not regular retail merchants upon the same footing so far as possible. If this is accomplished by taxing a right used by a non-resident in North Carolina by a method not condemned by the courts, then the tax must stand.

The tax "is a use tax, levied in the State of North Carolina upon profitable and commercial activity, which has otherwise escaped taxation and which, therefore, discriminates against no one but seeks to remove a discrimination previously existing against regular, taxed retail merchants. Under this statute the act taxed must occur in North Carolina, and the room where the act transpires must be within the State. The taxed activity must be directed at the retail trade in North Carolina, seeking to reach personally the citizens and residents of this State. The measure does not in any way impinge upon the activities of the wholesale trade, nor does it discriminate against non-residents. All citizens and residents of North Carolina, and non-residents alike (other than retail merchants who have already been taxed for their commercial activities.) who engage in the taxable activity are liable for the tax." (BEST v. MAXWELL, 216 N. C. 114.)

(Underscoring supplied).

The cases cited by the appellant, CALDWELL v. NORTH CAROLINA, 178 U. S. 622, 626, and NORFOLK & WEST. RY. v. SIMS, 191 U. S. 441, are not in point.

In CALDWELL v. NORTH CAROLINA, it was held that

an ordinance of the City of Greensboro, under which a license fee was required to be paid by an agent of a non-resident portrait company which shipped frames and pictures to the agent, who assembled them and delivered them to fill orders previously obtained, was invalid. The Court considered the license to be a direct burden on interstate commerce and hence, invalid. Therefore, it made no difference whether the act was discriminatory, since any tax on a purely interstate transaction was forbidden.

In *NORFOLK & WEST. RY. v. SIMS* the United States Supreme Court held that a North Carolina statute imposing a license tax on those "engaged in the business of selling" sewing machines in the State was an unconstitutional interference with interstate commerce so far as applied to the sale of a single machine shipped into the State by a non-resident manufacturer, upon the written order of a customer, under an ordinary C. O. D. consignment. It is apparent from a mere statement of the case that the transaction sought to be taxed was clearly within the ordinary concept of "interstate commerce," and as such, could not be interfered with by State laws. The case is not based, and does not purport to be based, on discrimination.

In *DOUGLAS AIRCRAFT COMPANY v. JOHNSON*, 90 Pac. (2d) 572 (1939) it was held, on the basis of *SO. PAC. CO. v. GALLAGHER*, 59 Sup. Ct. 389, (1939), and *TEL. & TEL. CO. v. GALLAGHER*, 59 Sup. Ct. 396 (1939) that a state statute taxing the use of personal property did not constitute a direct burden upon and discrimination against interstate commerce in violation of the commerce and due process clauses of the constitution. The personal property in question consisted of supplies and equipment purchased outside of the state and brought into the state to be used there by the purchaser.

These cases sustain use taxes on articles imported into a state. Where, as in this case, the use of a thing already in the state is taxed, i. e., the hotel room or residence, how much more reasonable it is to hold that there has been no discrimination against interstate commerce.

VII—THE STATUTE UNDER CONSIDERATION DOES NOT VIOLATE SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

It is urged that North Carolina has no taxing jurisdiction in this case because the tax is one upon the doing of business by the appellant outside the State of North Carolina, and upon appellant's merchandise situated outside of the State. It has been amply demonstrated elsewhere in appellee's brief that the tax is not one on an interstate commerce transaction. Appellant cannot rely on the "due process" provision in this case, unless it prevails also on the "commerce" argument, because the tax not being discriminatory, appellant's theory of "due process" can be founded only upon a lack of jurisdiction, which exists in this case only if an interstate transaction is being taxed.

When the highest court of the State of North Carolina has construed the statute here under attack and has stated the nature and character of the tax, the Supreme Court of the United States is bound by that construction. Under the construction by the state Court, the statute levies a tax upon the use of property in the State of North Carolina, property which, while being enjoyed by the appellant, enables it to maintain a real mercantile establishment performing all the functions of a permanent department store, except that of making immediate delivery. For this use of the property for the setting up of such an establishment the Legislature of North Carolina has fixed this tax and the Supreme Court of North Carolina has approved the tax. The Legislature did not tax "taking orders," "shipping into the State of merchandise," nor the "soliciting of orders in the State." The Legislature did not require a license of the appellant before it was permitted to do any of the things the Supreme Court of the United States has said the appellant could do without interference through taxation by the State of North Carolina. The Legislature said not only to the non-resident appellant, but to all who were not regular retail merchants in the State of North Carolina, that a desire to and a consummation of the desire by the renting of a hotel room, or a house, and occupying it temporarily for setting up a mercantile establishment doing all the things

usually done except making immediate delivery of goods purchased, should result in the incurring of the tax imposed by the statute here under consideration. If the action of the Legislature of North Carolina be a denial of due process, or a denial of any right guaranteed to the appellant by the Constitution of the United States, then let the states of this union take care that the denial of the right to tax the use made of property, or its rights, wholly local to the state, does not result, through greatly broadening application, in sources of present taxation being eliminated by adaptation of methods of doing business by the use of property protected as the appellant would have it protected.

CONCLUSION

The Supreme Court of North Carolina has determined the nature and character of the tax here under consideration. A tax of the nature and character determined by the highest court of North Carolina does not violate any of the provisions of the Constitution of the United States. It is, therefore, respectfully submitted that this appeal should be dismissed.

Respectfully submitted,

Dated November 2, 1940,

at Raleigh, N. C.

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APPENDIX "A"

Analysis of Opinions of the United States Supreme Court and certain state courts appearing in "Table of Cases" in "Brief of Appellant."

(The cases here appear in the order listed in the "Table of Cases.")

DECIDED

Oct. 20, 1924—AIR-WAY CORP. v. DAY, 266 U. S. 71, 45 S. Ct. 12.

Case to restrain collection of a franchise fee charged against plaintiff as a foreign corporation for the privilege of exercising its franchise in Ohio. Plaintiff was a Delaware corporation.

The statute imposed an annual fee on foreign corporations, in addition to the initial fees otherwise prescribed, for the privilege of exercising its franchise in Ohio upon the proportion of the authorized capital stock of the corporation represented by property owned and used and business transacted in Ohio.

May 4, 1925—ALPHA CEMENT CO. v. MASS., 268 U. S. 203, 45 S. Ct. 477.

Suit for recovery of taxes assessed and exacted.

The statute provided that "every foreign corporation shall pay annually with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of . . . five dollars per thousand and upon the value of the corporate excess employed by it within the commonwealth" and "two and one-half per cent of that part of its net income which is derived from business carried on within the commonwealth."

"The petitioner is a corporation organized under the laws of New Jersey. Its business is the manufacture and sale of cement. Its principal office is at Easton, Pa. Its mills are located in several other states outside of Massachusetts, from which shipments are made to various parts of the United States and to foreign countries. It maintains an office in Boston in charge of a district sales manager, with a clerk,

where its correspondence and other natural business activities in connection with the receipt of orders and shipments or goods for the New England states are conducted, etc."

June 9, 1919—AMERICAN MFG. CO. v. ST. LOUIS, 250 U. S. 459, 63 L. Ed. 1084.

Suit to recover back part of a municipal license tax.

The City of St. Louis, pursuant to a Missouri Statute, required every manufacturer in the city, before doing or offering to do business as such, to take out a license and pay, after report of business, a tax of \$1 on each \$1,000 of sales made.

The right to tax was sustained.

Oct. 29, 1888—ASHER v. TEXAS, 128 U. S. 129, 32 L. Ed. 368.

Case on writ of habeas corpus—

Statute involved act providing that there shall be levied on and collected "from every commercial traveler, drummer, salesman or solicitor of trade by sample or otherwise an annual occupation tax of thirty-five dollars, payable in advance;—to be paid to the comptroller," etc.

Asher was a citizen of the City of New Orleans, soliciting trade by use of samples for Charles G. Schulze, of New Orleans, as drummer in the City of Houston, Texas.

For not having taken out the required license, he was arrested.

Nov. 19, 1923—BINDERUP v. PATHE EXCHANGE, 263 U. S. 291, 44 S. Ct. 96.

Action under the provisions of the Federal Anti-Trust Act.

The case holds, on commerce, that where motion picture films were manufactured in one state and leased to exhibitors in other states, the business is "interstate commerce" though the films were consigned to local agents of distributors to be held until delivered to lessees in the same state.

The Court points out that (311): "The cases cited by defendants in error, upholding state taxation as not constituting an interference with interstate commerce, are of little value to the inquiry here. It does not follow that because a thing is

subject to state taxation it is also immune from federal regulation under the Commerce Clause." Citing *STAFFORD v. WALLACE*, 258 U. S. 525; *ADDYSTON PIPE LINE CO. v. UNITED STATES*, 175 U. S. 211.

April 30, 1894—*BRENNAN v. TITUSVILLE*, 153 U. S. 289, 38 L. Ed. 719.

Conviction for not taking out license and paying the license fee.

The statute provided "that all persons canvassing or soliciting within said city orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited "shall procure a license to transact said business" and pay the tax. Failure to procure the license was punishable.

Brennan represented a manufacturer located in the State of Illinois.

Jan. Term, 1827—*BROWN v. MARYLAND*, 12 Wheat. 419, 6 L. Ed. 678.

Indictment in the City Court of Baltimore. Statute provided: "That all importers of foreign articles, or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey and other distilled spirituous liquors, etc., and other persons selling the same by wholesale . . . shall . . . take out a license . . . for which they shall pay fifty dollars."

This indictment was against the importer, for selling a package of dry goods in the form in which it was imported.

Note: Overruled—5 How. 574, 587. 8 Wall 123.

Jan. 12, 1903—*CALDWELL v. NORTH CAROLINA*, 187 U. S. 622, 47 L. Ed. 336.

Involves the violation of an ordinance of the City of Greensboro requiring a license fee from persons engaged in selling or delivering picture frames or pictures.

Ordinance provided, "that every person engaged in the business of selling or delivering picture frames, pictures, photo-

graphs, or likeness of the human face, in the City of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid to the city, shall pay a license tax of \$10 for each year."

The defendant was employed by Chicago Portrait Company, a foreign corporation of Chicago, and was delivering certain pictures and frames in Greensboro for which contracts of sale had previously been made by other employees.

~~JAN. 1930—CARPENTER v. SHAW, 280 U. S. 363.~~

This case involved an Oklahoma tax upon "the owner of any royalty interest" in petroleum and natural gas, to the extent of 3 per cent. The petitioners, Choctaw Indians.

The court held that the tax was not permitted because of the Atoka Agreement with the Choctaw Indians.

May, 1936—CARTER v. CARTER COAL CO., 298 U. S. 238, 56 S. Ct. 855.

This case involves the "Bituminous Coal Conservation Act of 1935," and act of Congress.

The Court says that as used in the Constitution, the word "Commerce" is the equivalent of the phrase "intercourse for the purpose of trade," and includes TRANSPORTATION, PURCHASE, SALE, and EXCHANGE of commodities between the citizens of the different states.

The act was held unconstitutional as to the provisions considered.

May, 1932—CHAMPLIN REFINING CO. v. CORPORATION COMMISSION, 286 U. S. 210, 52 S. Ct. 559.

The Act of Oklahoma under consideration prohibits the production of petroleum in such a manner or under such conditions as constitute waste.

On the question of commerce the Court held that it is clear that the regulations prescribed and authorized by the act and the proration established by the commission apply only to

production and not to sales or transportation or crude oil or its products. This is "no violation of the commerce clause."

March, 1934—CHASSANIOL v. GREENWOOD, 291 U. S. 584, 54 S. Ct. 541.

The ordinance of Greenwood, Miss., imposed a tax upon every person engaged in the business of buying or selling cotton for himself within the city. Chassaniol contended that, though buying and selling for himself, the cotton was in interstate or foreign commerce, 90% being delivered to purchasers in other states.

The Court upheld the tax as a tax upon a local function or as being an occupation tax.

March 4, 1918—CHENEY BROS. v. MASSACHUSETTS, 246 U. S. 147, 62 L. Ed. 632.

A review of a judgment sustaining the validity of an excise tax imposed by Massachusetts on the defendant.

"We here are concerned with an excise tax imposed by Massachusetts in 1913, on each of seven foreign corporations on the ground that each was doing a local business in the State."

April 16, 1923—BOARD OF TRADE v. OLSEN, 262 U. S. 1, 43 S. Ct. 470.

Case involving the constitutionality of the Federal Grain Futures Act of 1922.

January, 1886—COE v. ERROL, 116 U. S. 517, 29 L. Ed. 715.

The tax here involved was imposed by the Town of Errol, New Hampshire, upon logs found within the town on the tax date, drawn from New Hampshire to be floated to the State of Maine to be manufactured and sold. At the time taxed, the logs had not begun their interstate trip.

The Court sustained the tax.

DEC. 1935—COLGATE v. HARVEY, 296 U. S. 404.

This case involved the Vermont Income and Franchise Tax Act of 1931, imposing individual income taxes. The statute was attacked as (1) imposing a tax upon dividends earned outside the state while exempting from tax dividends earned within the state; (2) discriminating in favor of money loaned within the state as against money loaned outside the state; and (3) arbitrarily denying exemption to appellant an exemption allowed to other persons with income from other sources.

The court concluded that the tax was valid in respect to the first and third points but invalid in respect to the second.

March 4, 1935—COONEY v. MOUNTAIN S. T. & T. CO., 294 U. S. 384, 55 S. Ct. 477.

Suit to restrain the enforcement of two acts of the Legislature of Montana, imposing annual license taxes.

The Laws of 1933, of Montana, imposed annual license tax for each telephone instrument used in the conduct of the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana.

Mountain States T. & T. Company was a Colorado corporation with system extending throughout seven states and a part of another, with 34,000 telephones in Montana.

March 7, 1887—CORSON v. MARYLAND, 120 U. S. 502, 30 L. Ed. 699.

Involves indictment for offering to sell and for selling by sample, in the City of Baltimore, without license, certain goods for a New York firm, to be shipped from New York directly to the purchaser.

The statute provided that, "no person or corporation other than the grower, maker or manufacturer shall barter or sell, or otherwise dispose of, or shall offer for sale any goods, chattels, wares, or merchandise within this State, without first obtaining a license in the manner herein prescribed."

April, 1938—COVERDALE v. PIPE LINE COMPANY, 303 U. S. 604, 58 S. Ct. 736.

Cited and discussed by defendant Maxwell in original brief.

Feb. 24, 1913—CRENSHAW v. ARKANSAS, 227 U. S. 389, 57 L. Ed. 565.

Case involving indictment for violating the peddling statute of the State of Arkansas.

The Statute provided, "that hereafter, before any person, either as owner, manufacturer, or agent, shall travel over and through any county and peddle or sell any lightning rod, steel stove range, clock, pump, buggy carriage, or other vehicle, or either of said articles, he shall procure a license, as hereinafter provided, from the county clerk of such county, authorizing such person to conduct such business."

Gannaway exhibited sample ranges and solicited and took orders and notes for ranges and Crenshaw acted as delivery man, both representing a range company at St. Louis, Missouri.

Dec. 1917—CREW LEVICK CO. v. PA., 245 U. S. 292, 62 L. Ed. 295.

The statute imposed an annual mercantile license tax upon wholesaler, retailer and venders on an exchange. A large portion of the Pennsylvania merchant's sales were upon orders taken in foreign countries and sent to the merchant who shipped direct to purchaser. A tax, under the statute, was imposed based upon the amount of gross annual receipts.

The question is whether a state can tax the business of selling in foreign commerce, or impose a tax, in effect, a regulation of foreign commerce or an impost upon exports.

The Court denied the right of the State of Pennsylvania to thus impose the tax.

May 25, 1891—CRUTCHER v. KENTUCKY, 141 U. S. 47, 35 L. Ed. 649.

Case upon an indictment in the State of Kentucky for acting and doing business as agent of the United Express Company,

alleged to be an express company not incorporated by the laws of Kentucky, but trading and doing business as a common carrier by express, of goods, etc., in and through the County and State of Kentucky, without having any license so to do either for himself or the company.

The statute provided, "that it shall not be lawful... for any agent of any express company, not incorporated by the laws of this Commonwealth, to set up, establish or carry on the business of transportation in this state, without first obtaining a license from the auditor of public accounts to carry on such business.

Dec. 1921—DAHNKE-WALKER CO. v. BOUDURANT, 257 U. S. 282, 42 S. Ct. 106.

This case was for damages for breach of a contract where the defense pleaded that the plaintiff corporation had not complied with the laws of Kentucky prescribing the conditions under which a foreign corporation could do business in that state. The plaintiff was only engaged in Kentucky in buying wheat and shipping it to its mill in Tennessee.

The Court held that the statute in question, which concededly imposed burdensome conditions, was as to that transaction invalid because repugnant to the commerce clause.

March, 1915—DAVIS v. VIRGINIA, 236 U. S. 697, 59 L. Ed. 795.

The plaintiff was convicted of peddling without a license. The statute is not set out in the opinion of the Court. The plaintiff represented a New York firm.

The Court held that an agent of a non-resident to whom the latter ships portraits made to fill orders taken by local solicitors, and in a separate parcel, frames suitable for such portraits, the orders for which contemplate delivery in appropriate frames which the customers may select, cannot be required to take out a peddler's license when engaged in putting the portraits into appropriate frames, delivering them, and offering the customers a choice of three different styles of frames, the customers taking one or more at their option.

March, 1907—**DELAMATER v. SOUTH DAKOTA**, 205 U. S. 93, 51 L. Ed. 724.

The Court in this case sustained a South Dakota law imposing a tax upon the business of selling in the state by any traveling salesman who solicits orders in quantities of less than 5 gallons as not being repugnant to the commerce clause in view of the provisions of the Wilson Act of 1890, that intoxicating liquors coming into the state shall be as completely under its control as if manufactured therein.

May, 1910—**DOZIER v. ALABAMA**, 218 U. S. 124, 54 L. Ed. 965.

The plaintiff was convicted for breach of an Alabama statute imposing a license tax on persons who did not have a permanent place of business in the state, and also kept picture frames as a part of their stock in trade, if they solicited orders for the enlargement of photographs or pictures of any character, or for picture frames, whether they made charge for such frames or not, or if they sold or disposed of picture frames. The plaintiff represented a Chicago, Ill., firm, took the orders which were filled, and then made delivery without paying a license tax and without a permanent place of business in Alabama.

The Act was condemned.

Dec. 5, 1938—**EDISON CO. v. LABOR BOARD**, 305 U. S. 497, 59 S. Ct. 206.

This case involves an order of the National Labor Relations Board, created under the National Labor Relations Act under which, for the purposes of the Act, interstate commerce is defined.

JAN. 1931—**EDUCATIONAL FILMS CORP. v. WARD**, 282 U. S. 379.

This case involved an income tax of New York upon "entire net income" imposed for the privilege of exercising its franchise in New York in corporate or organized capacity. The appellant owned copyrights and contended the tax was in-

valid as applied to copyrights because the copyrights were Federal instrumentalities.

The three-judge District Court dismissed the bill. This was affirmed by the Supreme Court.

Jan. 3, 1927—**FEDERAL TRADE COMMISSION v. PACIFIC PAPER ASSOCIATION**, 273 U. S. 52, 47 S. Ct. 255.

Case involving validity of an order of Federal Trade Commission requiring respondents to cease and desist from certain competitive practices prohibited by The Federal Trade Commission Act.

OCT. 1928—**FOSTER PACKING CO. v. HAYDEL**, 278 U. S. 1.

This case involved the validity of the Louisiana "Shrimp Act" of 1926 which attempted to permit only residents or domestic corporations acquiring a qualified interest or property in shrimp taken in Louisiana. One of the petitioners was a Mississippi corporation shipping shrimp in interstate commerce.

The court found that the act favored the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Mississippi company. The act was held to obstruct and burden interstate commerce.

Feb. 24, 1931—**FURST v. BREWSTER**, 282 U. S. 493, 51 S. Ct. 295.

Here the Court held that an Arkansas Statute prohibiting a foreign corporation to sue in the state courts where the statutory requirements had not been met by such corporation, was invalid as applied to a suit by such corporation based upon interstate transaction.

MAY, 1909—**GALVESTON, HARRISBURG & RY. CO. v. TEXAS**, 210 U. S. 217.

This case involved a Texas tax upon the gross income of railroad corporations and others owning or controlling a line of railroad in Texas. Much of the income of petitioner was derived from carrying interstate passengers and freight.

The court invalidated the tax as applying indiscriminately to gross receipts from commerce within as well as without the state.

February, 1824—GIBBONS v. OGDEN, 9 Wheat. 1, 6 L. Ed. 1.

HELD: The Statutes of the State of New York granting to Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years, are repugnant to the commerce clause of the Federal Constitution, so far as said Statutes prohibit vessels licensed, according to the laws of the United States, from carrying on the coasting trade, from navigating said waters by means of fire or steam.

Jan. 3, 1939—GWYN v. HENNEFORD, 305 U. S. 434, 59 S. Ct. (Adv. Sheet) 325. Action to restrain collection of a tax imposed under Washington State Statute, which levied a tax "for the privilege of engaging in business activities" within the state at the rate of a certain percentage of the gross income.

HELD: Invalid as applied to Washington Corporation, engaged as marketing agent for fruit growers cooperative, organizations in making sales and deliveries in other states of fruit grown in Washington, in collecting sales prices and remitting proceeds after deduction of expenses and its compensation.

Nov. 27, 1922—HEISLER v. THOMAS COLLIER CO., 260 U. S. 245, 43 S. Ct. 83.

Suit to enjoin enforcement of Pennsylvania Statute which provided that each ton of anthracite coal mined, "washed or screened, or otherwise prepared for market" in the State should be "subject to a tax of 1½% of the value thereof when prepared for market," the tax to be assessed when coal subjected to the indicated preparation "is ready for shipment or market." Suit dismissed.

HELD: Statute not invalid, as burden on interstate commerce, although a large percentage of coal in Pennsylvania is destined to be shipped to other states.

April 8, 1929—**HELSON, et als v. KENTUCKY**, 279 U. S. 245, 49 S. Ct. 279.

Kentucky Statute imposed tax of five cents per gallon on all gasoline sold within state at wholesale, and upon gasoline purchased without the state and sold, distributed or used within the state. In the suit, Kentucky sought to collect tax on gasoline purchased in Illinois—the 75% of it consumed within Kentucky—used in making an interstate journey.

HELD: Statute invalid as applied to stated facts because a violation of commerce clause. (Five to Four opinion)—“Distinguished” in **EASTERN AIR TRANSPORT v. TAX COMMISSION**, 285 U. S. 147, 52 S. Ct. 340, 341.

March 29, 1937—**HENNEFORD v. SILAS MASON CO.**, 300 U. S. 577, 57 S. Ct. 524.

See discussion of this case, relied upon by the defendant Maxwell, in defendant's original brief.

Feb. 23, 1915—**HEYMAN v. HAYS**, 236 U. S. 178, 59 L. Ed. 527.

HELD: Tennessee Statute imposing privilege tax upon wholesale and retail liquor dealers is invalid as applied to a business of soliciting by mail orders for intoxicating liquors from persons in other states, and of delivering intoxicating liquors from an existing stock on hand in the state to a carrier for interstate shipment.

MOR. 1918—**INTERNATIONAL PAPER COMPANY v. MASSACHUSETTS**, 246 U. S. 135.

This is a suit by a New York Corporation to recover an excise tax assessed by Massachusetts as a condition of admitting the corporation, engaged in both local and interstate commerce, to engage in business in Massachusetts.

The court invalidated the tax as constituting an unlawful burden on interstate commerce.

April 4, 1910—INTERNATIONAL TEXTBOOK CO. v. PIGG, 217 U. S. 91, 54 L. Ed. 678.

Kansas Statute provided that "no action shall be maintained or recovery had in any of the courts of this state by any corporation doing business in this state without first obtaining the certificate of the Secretary of State that statements (of corporation's financial condition) provided for in this section have been properly made."

HELD: Unconstitutional as applied to plaintiff, Pennsylvania Corporation, which failed to comply with statute, whose sole activity in Kansas was: soliciting, by agent, students for correspondence school courses, mailing needful books, papers, etc., to students, and collecting, by agent, tuition fees which were forwarded to home office.

FEB. 1916—KANSAS CITY RY. v. KANSAS (BOTKIN), 240 U. S. 227.

This case involved an annual tax of Kansas on domestic corporation, graduated according to the amount of the paid-up capital stock.

The court upheld the tax.

NOV. 1925—KANSAS CITY STEEL CO. v. ARKANSAS, 269 U. S. 148.

This case involves a penalty against a foreign corporation doing business in Arkansas without obtaining permission.

It was found that the corporation was doing business in Arkansas and the penalty was sustained.

Oct. 22, 1888—KIDD v. PEARSON, 128 U. S. 1, 32 L. Ed. 346.

Iowa Statute provided for the abating as a nuisance of any distillery used for the unlawful manufacture and sale of intoxicating liquors. All liquors manufactured by the defendant were shipped and sold out of the State of Iowa.

HELD: Statute valid and decree ordering distillery to be abated as nuisance affirmed.

April 12, 1937—LABOR BOARD CASES,

301 U. S. 1, 57 S. Ct. 615

301 U. S. 49, 57 S. Ct. 642

301 U. S. 58, 57 S. Ct. 645.

These cases all involved solely the Federal Statute known as the National Labor Relations Act which, for the purposes of the Act, defined interstate commerce.

MAY, 1932—LAWRENCE v. STATE TAX COMMISSION, 286 U. S. 276.

This case involved a Mississippi tax upon net income, which excluded from the income of a domestic corporation sums earned from sources without the state. The petitioner, an individual, engaged in constructing roads in Tennessee, attacked the law as giving the exemption to domestic corporations and not to individuals.

The court upheld the right to tax in this manner domestic corporations and citizens of Mississippi.

MAY, 1888—LELOUP v. PORT OF MOBILE, 127 U. S. 640.

This case involves the validity of an ordinance requiring a license fee of telegraph companies to do business in the Port of Mobile. The plaintiff was agent for the Western Union Telegraph Company.

The Court condemned the tax.

Dec. 10, 1917—LOONEY v. CRANE COMPANY, 245 U. S. 178, 62 L. Ed. 230.

Texas Statute imposed a tax as a condition of admitting a foreign corporation to do business in the State, based upon the amount of its authorized capital stock, and imposed a franchise tax based upon capital, surplus, and undivided profits.

HELD: As to a foreign corporation engaged in interstate commerce, the Statute is unconstitutional—in violation of commerce clause and due process clause of Federal Constitution.

APRIL, 1928—LOUISVILLE GAS CO. v. COLEMAN, 277 U. S. 32

The plaintiff in error, a Kentucky Corporation, presented a deed of trust for registration. A tax was assessed under an act which exempted indebtedness maturing within five years, and indebtedness to building and loan associations. The tax was challenged as not meeting the equal protection clause of the Federal Constitution.

The court held that equal services were rendered as to indebtedness maturing within five years and indebtedness maturing after five years. The extending of free service to the former and the taxing of the latter was held as an unreasonable classification.

APRIL, 1890—LYNG v. MICHIGAN, 135 U. S. 161.

This case involves a Michigan tax in connection with the manufacture and handling of liquors. The outsider was subjected to a tax which the resident did not have to pay.

The court invalidated the tax.

MAY, 1929—MACALLEN v. MASSACHUSETTS, 279 U. S. 620.

This case involved taxes assessed by Massachusetts against a corporation upon income which included bonds of the United States and bonds of Massachusetts which, when issued, were tax exempt.

The court invalidated the tax as to United States bonds as impairing the right of the Federal government to borrow money and as to the state bonds as impairing a contract.

May 19, 1890—MCCALL v. CALIFORNIA, 136 U. S. 104, 34 L. Ed. 391.

An "Order" of City and County of San Francisco, imposed a municipal license tax of \$20.00 per quarter for "every railroad agency." Violation of Order made a misdemeanor. McCall was agent in San Francisco, Cal., for a railroad corporation having its principal office in Illinois and operating a continu-

ous line of road between Chicago and New York, the agent's duty being to solicit passenger traffic over the line he represented. McCall was convicted under the "Order."

HELD: "Order" unconstitutional as applied to business of McCall, because repugnant to "Commerce Clause" of Federal Constitution.

FEB, 1940—McCARROLL v. DIXIE LINES, 309 U. S. 176.

This case involves the right of the State of Arkansas to require the payment of a gas tax upon all gasoline above twenty gallons before the bus of the defendant can enter the State line.

The tax was invalidated.

JAN. 1940—McGOLDRICK v. BERWIND-WHITE CO., 309 U. S. 33.

(This case is used in the brief of each party to this appeal and thus clearly presents the statute involved in the case.)

Nov. 6, 1933—MINNESOTA v. BLASIUS, 290 U. S. 1, 54 S. Ct. 34.

Minnesota Statute imposed general tax upon personal property levied against owner of property on certain date. On the date prescribed, Blasius, a trader in livestock at the St. Paul Union Stock Yards, owned and was in possession of 11 head of cattle purchased for resale; practically all cattle purchased by him was sold and shipped to non-residents of the State; the cattle in question were all sold to non-resident purchasers and shipped outside the State on the date mentioned and the day following.

HELD: Tax upon said cattle valid.

FEB. 1933—NASHVILLE C. & ST. L. RY. v. WALLACE, 288 U. S. 249.

This case involved a Tennessee tax on gasoline in storage in Tennessee, although the gasoline was withdrawn from

storage only for use mainly as an instrument in interstate commerce.

The Court sustained the tax.

JUNE, 1931—NEAR v. MINNESOTA, 283 U. S. 697.

This case involved a law of Minnesota declaring certain publications a nuisance. Only the question of the freedom of the press was involved.

The court condemned the statute.

Dec. 7, 1903—NORFOLK & WESTERN R. CO. v. SIMS, 191 U. S. 441, 48 L. Ed. 254.

HELD: The license tax imposed by a North Carolina Statute, upon all those "engaged in the business of selling" sewing machines in the State, is unconstitutional (in violation of commerce clause, insofar as applied to the sale of a single machine shipped into the State from Illinois by a non-resident manufacturing corporation, upon the written order of a customer, under an ordinary C.O.D. consignment).

MAY, 1911—OKLAHOMA v. KANSAS NAT. GAS CO., 221 U. S. 229.

This case involved an Oklahoma statute prohibiting the transportation across state lines of natural gas. The defendant was a Delaware Corporation preparing to transport through pipe lines natural gas from Oklahoma to other states.

The court denied the right of the state to thus regulate interstate commerce.

JAN., 1925—OZARK PIPE LINE v. NOMER, 266 U. S. 555.

This case involved an attempt of Missouri to collect an annual franchise tax from the plaintiff engaged in transporting petroleum by pipe line as a condition to the plaintiff engaging in business.

The court declared the law under which the collection of the tax was attempted unconstitutional as applied to plaintiff.

JULY, 1939—PEOPLE v. HORTON MOTOR LINES, 281 N. Y. 196.

This case involved the New York ordinances requiring that the business of operating public carts must be licensed. The defendant operated as a common carrier interstate.

The court held that shipments from other states to New York or from New York to other states was interstate commerce and that the defendant was not required to obtain a license under the ordinances.

Mar. 17, 1919—POSTAL TELEGRAPH-CABLE COMPANY v. RICHMOND, 249 U. S. 252, 63 L. Ed. 590.

Appeal from Federal District Court to review decree dismissing bill by telegraph company to enjoin collection of certain municipal license taxes imposed by ordinance by City of Richmond, Va. Ordinance imposed annual license tax of \$300 "for the privilege of doing business within the City of Richmond, but not including business done to or from points without the State, and not including any business done for the Government of the United States." Other ordinance imposed an annual fee of \$2.00 for each telegraph pole maintained or used in the streets of the city.

HELD: Decree affirmed. Ordinances valid. No burden on interstate commerce.

Nov. 8, 1937—PUGET SOUND CO. v. TAX COMMISSION, 302 U. S. 90, 58 S. Ct. 72.

Washington State Statute imposing tax upon business measured by gross receipts held: (1) invalid, as violation of commerce clause, insofar as it related to the business of a stevedore company of loading and discharging cargoes by longshoremen subject to the company's direction and control; the business being interstate or foreign commerce; (2) valid, as applied to the business of stevedoring company, which consisted of supplying longshoremen to shipowners or masters without directing or controlling work of loading or unloading, such business not being interstate or foreign commerce.

May 25, 1925—**REAL SILK MILLS v. PORTLAND**, 268 U. S. 325, 45 S. Ct. 525.

An ordinance, imposing license tax on solicitors taking orders in Portland, Oregon, for hosiery to be shipped to buyers in Portland, Oregon, by the manufacturer in Illinois, was held invalid, because in violation of commerce clause.

Dec. 17, 1906—**REARICK v. PENNSYLVANIA**, 203 U. S. 507, 51 L. Ed. 295.

An ordinance of the borough of Sunbury, Penn., made it unlawful to solicit orders for, sell, or deliver, at retail, either on the streets or by traveling from house to house, foreign or domestic goods, not of the parties own manufacture or production, without a license, for which a large fee was required. The defendant (plaintiff in error) was employed by foreign corporation to solicit, within the municipality, orders for groceries which the company filled by shipping goods to him for delivery to customers, from whom defendant collected, the goods being shipped in distinct packages corresponding to the several orders, wrapped up conveniently for shipment.

HELD: Ordinance invalid because in violation of commerce clause.

Mar. 7, 1887—**ROBBINS v. SHELBY**, 120 U. S. 489, 30 L. Ed. 694.

Tennessee Statute provided: "All drummers, and all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, etc., therein, by sample shall be required to pay" \$10 per week for such privilege. Statute held invalid, as a violation of the commerce clause, as applied to a drummer representing an Ohio dealer negotiating sales of articles to be shipped from Ohio to Tennessee.

Feb. 24, 1913—**ROGERS v. ARKANSAS**, 227 U. S. 401, 57 L. Ed. 569.

Plaintiff in error convicted of peddling buggies in Arkansas without having paid license or privilege tax required by Ar-

Kansas Statute: Plaintiff in error was a salesman of foreign company and traveled about exhibiting sample buggies in Arkansas. Orders are signed by purchasers and are sent to agent of company in Tennessee. There, the buggies are tagged with the names of the respective purchasers and shipped in carload lots to the place in Arkansas where they are delivered, consigned to the company.

HELD: Conviction set aside. Statute invalid as applied to defendant in error.

NOV., 1935—SCHUYKILL TRUST CO. v. PENNA., 296 U. S. 113.

This case involves a Pennsylvania tax on shares of capital stock. The plaintiff contended the tax as construed and applied discriminated against United States government bonds, bonds of federal instrumentalities, and national bank stock.

The court sustained the contention of the plaintiff and condemned the tax.

June 11, 1923—SONNEBORN BROS. v. CURETON, 262 U. S. 504 (506), 43 S. Ct. 643.

Appellants transported oil from New York and elsewhere outside of Texas to their warehouses in Texas and the oil was there held for sales in Texas in original packages of transportation, and was subsequently sold and delivered in Texas in such original packages.

HELD: Texas Statute imposing occupation tax upon appellants based partially upon receipts from sale of oil transported into Texas and sold as stated, was valid and not a burden on interstate commerce.

Feb. 14, 1938—SOUTH CAROLINA v. BARNWELL BROS., 303 U. S. 177, 58 S. Ct. 510.

South Carolina Statute prohibiting use of State highways by certain types of trucks whose widths exceed 90 inches and whose weights exceed 20,000 pounds, is valid and is not a

violation of either the 14th Amendment or the commerce clause of the Federal Constitution even as applied to interstate motor carriers.

Jan. 30, 1939—SOUTHERN PACIFIC CO. v. GALLAGHER, 306 U. S. 167, 59 S. Ct. (Adv. Sheet) 389.

Under California use tax act which imposed a use tax on a consumer of tangible personal property for "use" or "storage," it was held that the tax was valid even as applied to articles ordered by an interstate railroad out of the State under specification suitable only for utilization in transportation facilities and installed immediately on arrival at California destination, the tax being effective at the moment when the articles reached the end of interstate transportation and had not begun to be consumed in interstate operation. The tax was held valid as against the contention that the act was violative of commerce clause of Federal Constitution.

Feb. 21, 1910—SOUTHERN RY. CO. v. GREENE, 216 U. S. 400, 54 L. Ed. 536.

HELD: A foreign railway corporation which has come into the state in compliance with its laws, and has therein acquired property, etc., is protected by U. S. Constitution against a state statute imposing an additional franchise tax for privilege of doing business within state, where no such tax is imposed upon domestic corporations carrying on a precisely similar business.

May 1, 1922—STAFFORD v. WALLACE, 258 U. S. 495, 42 S. Ct. 397.

Suit to enjoin enforcement of orders of the Secretary of Agriculture under the Federal "Packers and Stock Yards Act of 1921."

STATE OF LOUISIANA v. BEST & COMPANY, 194 La. 918;
STATE v. YETTER, 192 S. C. 1.

These two cases deal with the same tax involved in the appeal from the Supreme Court of North Carolina now under consideration.

MARCH, 1914—STEWART v. MICHIGAN, 232 U. S. 665.

This case involved the legality of a conviction of the Plaintiff in error for "taking orders for the purchase of foods, ware, and merchandise, by sample, lists, and catalogues, without having then and there obtained a license as a hawker and peddler, as required" by the laws of Michigan of 1897.

The court condemned the law under which the plaintiff in error was convicted.

April 7, 1902—STOCKARD v. MORGAN, 185 U. S. 27, 46 L. Ed. . . .

Tennessee statute imposed a privilege tax upon persons doing business as merchandise brokers.

HELD: Invalid as applied to brokers whose business is exclusively confined to soliciting orders from jobbers and wholesale dealers within the State, as agents for non-resident principals for goods to be shipped by such non-resident principals to such jobbers or dealers, because a violation of commerce clause.

Jan. 14, 1889—STOUTENBURG v. HENNICK, 129 U. S. 141, 32 L. Ed. 637.

Clause 3 of Section 21 of an Act of Legislative Assembly of District of Columbia (requiring a license to engage in any business, trade, etc.) provided: "Commercial agents shall pay \$200 annually. Every person whose business it is, as agent, to offer for sale goods, wares, or merchandise by sample, catalogue or otherwise, shall be regarded as a commercial agent."

The defendant was agent for a Maryland concern, engaged in soliciting orders in D. C., to be shipped from Md., into D. C. He had no license and was convicted and imprisoned. His release in Habeas Corpus Proceeding was affirmed, the Court holding that Congress did not delegate to the Legislative Assembly of the District of Columbia power to enact Clause 3 of Section 21 of the Act—quoted above.

Jan. 30, 1905—**SWIFT & CO. v. UNITED STATES**, 196 U. S. 375, 49 L. Ed. 518.

Suit to enjoin violations of Federal Statute known as the "Sherman Anti-Trust Act."

Feb. 18, 1924—**TEXAS T. CO v. NEW ORLEANS**, 264 U. S. 150, 44 S. Ct. 242.

Court held unconstitutional a municipal ordinance imposing a license tax on a company acting as steamship agent for certain steamship companies exclusively engaged in interstate or foreign commerce, in soliciting cargo, arranging for its acceptance, issuing bills of lading, etc., the agent being paid a commission on the gross freight charges. The ordinance violated the commerce clause of Federal Constitution.

1852—**VEAZIE v. MOORE**, 14 How. 568, 14 L. Ed. 545.

A law of the State of Maine granted privileges of exclusive navigation of the upper waters of the Penobscot River. The river is entirely within the State of Maine.

HELD: Statute valid and not in conflict with the commerce clause, and a license granted by Federal officials to defendant in error to carry on the coasting trade did not entitle defendant to navigate the upper waters of said river.

Dec. 8, 1919—**WAGNER v. CITY OF COVINGTON**, 251 U. S. 95, 64 L. Ed. 157.

A municipal ordinance required all wholesalers of soft drinks to take out a license and pay fees therefor.

HELD: Valid and constitutional, as applied to a non-resident (Ohio) manufacturer of soft drinks doing a business in the (Kentucky) municipality which largely consists in carrying a supply of such drinks from one retailer's place of business to another's upon the truck in which the goods were brought across the State line from Ohio into Kentucky, exposing them for sale, soliciting and negotiating sales, and immediately delivering the goods sold in the original unbroken cases.

Jan. 4, 1918—WEEKS v. UNITED STATES, 245 U. S. 618, 62 L. Ed. 513.

Case involved a prosecution under Federal Act prohibiting misbranding of foods shipped in interstate commerce.

Jan. 17, 1876—WELTON v. MISSOURI, 91 U. S. 275, 23 L. Ed. 347.

Missouri Statute provided that persons who deal in the sale of goods, etc., not the growth, produce or manufacture of the State of Missouri, by going from place to place to sell them in the State should pay a license tax. No license was required of persons selling, in a similar way, goods which were the growth, produce, etc., of the State.

HELD: Statute invalid because in conflict with commerce clause of Federal Constitution.

Feb. 28, 1938—WESTERN LIVESTOCK v. BUREAU OF REVENUE, et al., 303 U. S. 250; 58 S. Ct. 546.

This case cited and discussed in the original brief of defendant Maxwell.

APPENDIX B

N. C. Public Laws of 1937, Chapter 127.

Sec. 404. Definitions.

For the purposes of this article:

5. The words "retail merchant" shall mean every person who engages in the business of buying or acquiring, by consignment or otherwise, any articles of commerce and selling same at retail.

Sec. 405. Taxes Levied.

If any person, after the thirtieth day of June, one thousand nine hundred thirty-seven, shall engage or continue in any business for which a privilege tax is imposed by this article, such person shall apply for and obtain from the commissioner, upon the payment of the sum of one dollar (\$1.00), a license to engage in and conduct such business upon the condition that such person shall pay the tax accruing to the State of North Carolina under the provisions of this article; and he shall thereby be duly licensed to engage in and conduct such business. The license tax levied in this section shall be a continuing license until revoked for failure to comply with the provisions of this article. License issued under Article V, Chapter four hundred forty-five, Public Laws of one thousand nine hundred thirty-three, for the year one thousand nine hundred thirty-four, one thousand nine hundred thirty-five, and under Chapter three hundred seventy-one, Public Laws of one thousand nine hundred thirty-five, for the biennium one thousand nine hundred thirty-five, one thousand nine hundred thirty-seven, shall be deemed a continuing license under this section.

An additional tax is hereby levied for the privilege of engaging or continuing in the business of selling tangible personal property, as follows:

(a) Wholesale merchants. Upon every wholesale merchant as defined in this article, an annual license tax of ten dollars (\$10.00). Such annual license shall be paid in advance within the first fifteen days of July in each year or, in the case of a new business, within fifteen days after business is commenced. There is also levied on each wholesale merchant an additional tax of one-twentieth of one per cent ($1/20$ th of 1%) of the total gross sales of the business.

The sale of any article of merchandise by any "wholesale merchant" to any one other than a merchant for resale shall be taxable at the rate of tax provided in this article upon the retail sale of merchandise. In the interpretation of this article the sale of any articles of commerce by any "wholesale merchant" to any one not taxable under this article as a "retail merchant," except as otherwise provided in this article, shall be taxable by the wholesale merchant at the rate of tax provided in this article upon the retail sale of merchandise. The Commissioner of Revenue is authorized to make appropriate regulations, consistent with this article to prevent abuse with respect to existing regulations defining transactions entitled to the rate of tax levied on sales at wholesale.

(b) Retail merchants. Upon every retail merchant, as defined in this article, a tax of three per cent (3%) of the total gross sales of the business of every such retail merchant: *Provided*, however, the maximum tax that shall be imposed upon the sale of any single article of merchandise shall be fifteen dollars (\$15.00).

(c) Motor vehicles. In addition to the taxes levied in this article or in any other law, there is hereby levied and imposed upon every person, for the privilege of using the streets and highways of this State, a tax of three per cent (3%) of the sales or purchase price of any new or used motor vehicle purchased or acquired for use on the streets and highways of this State requiring registration thereof under the Motor Vehicle Laws of this State, which said amount shall not exceed fifteen dollars (\$15.00), and shall be paid to the Commissioner of Revenue at the time of applying for certificate of title or registration of such motor vehicle. No certificate of title or registration plate shall be issued for same unless and until said

tax has been paid. *Provided, however*, if such person so applying for certificate of title or registration and license plate for such motor vehicle shall furnish to the Commissioner of Revenue a certificate from a motor vehicle dealer licensed to do business in this State, upon a form furnished by the commissioner, certifying that such person has paid the tax thereon levied in this article, the tax herein levied shall be remitted to such person to avoid in effect double taxation on said motor vehicle under this article. The term "motor vehicle" as used in this section shall include trailers.

N. C. Public Laws of 1937, Chapter 127, Section 121(e).

(e) Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of displaying such samples, goods, wares, or merchandise, and shall pay an annual privilege tax of two hundred fifty dollars (\$250.00), which license shall entitle such person, firm or corporation to display such samples, goods, wares, or merchandise, in any county in this State.

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SUPREME COURT OF THE UNITED STATES.

No. 61.—OCTOBER TERM, 1940.

Best & Company, Inc., Appellant,	}	Appeal from the Supreme Court of the State of North Carolina.
vs.		
A. J. Maxwell, Commissioner of Revenue for the State of North Carolina.		

[December 23, 1940.]

Mr. Justice REED delivered the opinion of the Court.

Appellant, a New York retail merchandise establishment, rented a display room in a North Carolina hotel for several days during February, 1938, and took orders for goods corresponding to samples; it filled the orders by shipping direct to the customers from New York City. Before using the room appellant paid under protest the tax required by chapter 127, section 121(e), of the North Carolina Laws of 1937, which levies an annual privilege tax of \$250 on every person or corporation, not a regular retail merchant in the state, who displays samples in any hotel room rented or occupied temporarily for the purpose of securing retail orders.¹ Appellant not being a regular retail merchant of North Carolina admittedly comes within the statute. Asserting, however, that the tax was unconstitutional, especially in view of the commerce clause, it brought this suit for a refund and succeeded in the trial court. The Supreme Court of North Carolina reversed and then, being evenly divided on rehearing, allowed the reversal to stand.² The

¹ "(e) Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of displaying such samples, goods, wares, or merchandise, and shall pay an annual privilege tax of two hundred fifty dollars (\$250.00), which license shall entitle such person, firm or corporation to display such samples, goods, wares, or merchandise in any county in this State."

² 216 N. C. 114; 217 N. C. 134.

prevailing opinion characterized the tax as one on the commercial use of temporary quarters, which in its operation did not discriminate against interstate commerce and therefore did not come into conflict with the commerce clause.

The commerce clause forbids discrimination, whether forthright or ingenious.³ In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. This standard we think condemns the tax at bar. Nominally the statute taxes all who are not regular retail merchants in North Carolina, regardless of whether they are residents or nonresidents. We must assume, however, on this record that those North Carolina residents competing with appellant for the sale of similar merchandise will normally be regular retail merchants. The retail stores of the state are the natural outlets for merchandise, not those who sell only by sample. Some of these local shops may, like appellant, rent temporary display rooms in sections of North Carolina where they have no permanent store, but even these escape the tax at bar because the location of their central retail store somewhere within the state will qualify them as "regular retail merchants in the State of North Carolina." The only corresponding fixed-sum license tax to which appellant's real competitors are subject is a tax of \$1 per annum for the privilege of doing business. Nonresidents wishing to display their wares must either establish themselves as regular North Carolina retail merchants at prohibitive expense, or else pay this \$250 tax that bears no relation to actual or probable sales but must be paid in advance no matter how small the sales turn out to be. Interstate commerce can hardly survive in so hostile an atmosphere. A \$250 investment in advance, required of out-of-state retailers but not of their real local competitors, can operate only to discourage and hinder the appearance of interstate commerce in the North Carolina

³ *Welton v. Missouri*, 91 U. S. 275, 282-83; *Guy v. Baltimore*, 100 U. S. 434; *Webber v. Virginia*, 103 U. S. 344; *Hale v. Bimco Trading Co.*, 306 U. S. 375. In *McGoldrick v. Berwind-White Co.*, 309 U. S. 33, we pointed out that the line of decisions following *Robbins v. Shelby County*, 120 U. S. 489, read in their proper historical setting, rested on the actual and potential discrimination inherent in certain fixed-sum license taxes (pp. 55-57). There is no occasion now to reexamine the particular tax statutes involved in these cases.

⁴ North Carolina Laws of 1937, c. 127, § 405.

retail market. Extrastate merchants would be compelled to turn over their North Carolina trade to regular local merchants selling by sample. North Carolina regular retail merchants would benefit, but to the same extent the commerce of the Nation would suffer discrimination.

The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible each of the language.⁵

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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